THIRD PART.

THE PRIVILEGE

OF THE

WRIT OF HABEAS CORPUS

UNDER

THE CONSTITUTION.

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PREFACE.

I HOPE I do not require an excuse for writing the following paper in the direct personal form. It avoids circumlocution. It does not affect to speak for any one else, or to vouch any other authority than it names; and if its propositions and arguments are not egotistical, it is as remote from self-conceit as if it were written impersonally.

HORACE BINNEY.

PHILADELPHIA, March 4th, 1865.

This pamphlet was ready for the press, and in course of being printed, at the date of the Preface; but the engrossing events of April have postponed its publication.

CORRIGENDA.

Page	10,	line	31,	after *which*	insert	*in regard to Statutes.*
"	20,	"	10,	for *second*	"	*first.*
"	24,	"	29,	" *countries*	"	*continent.*
"	29,	"	4,	" *second*	"	*first.*
"	29,	"	24,	" *second*	"	*first.*
"	61,	"	21,	" *suspensive*	"	*suspending.*
"	64,	"	10,	" *suspensive*	"	*suspending.*
"	70,	"	37,	after *Act*	"	*except specially and plainly expressed treason and felony.*
"	73,	"	26,	for *suspensive*	"	*suspending.*

THE PRIVILEGE OF THE WRIT.

THIRD PART.

When the first part of the essays under this title was written, there was but one aspect in which the public in this nation regarded suspension of the privilege of the Writ of Habeas Corpus, namely, in relation to the department of our Government that was competent by the Constitution to initiate suspension, under the conditions annexed to that power. The President, the head of the Executive department, had, it was understood, exercised that power in one or more instances, without authority given by Act of Congress; and the legal competency of his action was, for the time, the exclusive point of view to which the eye was directed. The suggestions in Part I of these essays were made to support one hypothesis on this subject, and to contribute what I could to the collections of thought and remark which were then being made, to settle in the right way a question that was substantially new, and upon which there were opposing opinions.

Further thoughts, in a much more important division of the subject, which has since become prominent, have not altered my mind on that point; whether reasonably or not, the reader will judge when he has them before him. One thing, at least, I think the candid reader must perceive, that in all I have written, or shall now write, it was not, and is not, the personal President, or the actual Congress, that I had or have in view, but the Constitution, and both the efficient and the safe execution of a power given by the Constitution, which must be ineffectual if it be slow, and unnecessarily dangerous if it be wholly uncertain, or not attended by proper responsibility, official and judicial, for its constitutional exercise. Equally

with this had I, and still have in view, the principle of personal freedom while in the observance of the laws, and of judicial cognizance and oversight to defend and relieve it, whenever it is not constitutionally made to give way to the always paramount interest of the public safety.

The first part of these essays regarded, as I have said, the initiatory or introductory power of suspending the privilege of the Writ of Habeas Corpus. Its better position in point of order, and of proof also, would have been after this paper, and not before it; but it accompanied the question of the day, which turned exclusively upon the competency of the Executive department. The present paper will regard the nature of the power, its extent and range; a vastly greater, it will be admitted, and more important subject for inquiry and consideration; and I write what follows as my contribution to the collection of thoughts, from which is to come the final and true result.

I have reviewed all my suggestions and statements in my former papers. Considering the narrowness of the point then before me, I have not as much to qualify or retract as frank and candid men usually have, in revising a partial view in connection with a more comprehensive one which includes it. But on this review, which has led to the sketch I shall exhibit of suspension of Habeas Corpus in England, before as well as after the Habeas Corpus Act of Charles II, I have to acknowledge, that I may have said too much in praise of the fidelity of the English law at all times to the principle of personal freedom asserted by Magna Carta, and succeeding statutes. Until I read the whole case of *The King* against *Sir Thomas Darnell* with the other four gentlemen who were imprisoned by the special command of Charles I, *without any cause shown*, and then read the arguments of *Selden*, *Coke*, and others in the House of Commons, and upon the conference between the Lords and Commons in regard to that case and to the resolutions of the Commons which had ensued, as they are related in Rushworth's Historical Collections, I was not aware that the law of England in the 16th century, and to a late period of the 17th, connived to the extent that I think it did, at denials of bail, upon warrants of imprisonment by the Privy Council for undescribed High Treason; nor did I obtain the true solution of an important

exception in the second section of the Habeas Corpus Act of 31 Charles II, and of the *formula* of the subsequent Acts of Parliament, which are called *suspensions* of it, and which substantially are temporary relaxations of that exception. I of course knew very well, as all professional lawyers know, the statute distinction between bailable and non-bailable crimes; and also Lord Hale's remark, that the statutes of Magna Carta, and 25 Edw. III, c. 2, are not *concerned* in preliminary imprisonments for felony, nor for treason therefore, which includes felony; and also Sir Edward Coke's position in his third Institute, that if a court of record commit for contempt or the like, they can discharge at pleasure; but if they commit for treason or felony or *suspicion of it*, they cannot discharge until the prisoner be inquired of, and an ignoramus found, or he be indicted and acquitted. But until that review, and especially until I had read Sir Edward Coke's admission, on the very point of the authority of the Privy Council in matters of State, I was not aware that the twelve Judges of England had resolved, *unâ voce*, in the 34th year of Queen Elizabeth, that the courts would absolutely remand a prisoner upon accusatory imprisonments by the Privy Council, or one or two of them, for High Treason *in generality*, that is to say, without a word to specify whether it was compassing the King's death, or levying war against him in his realm, or counterfeiting the great or privy seal, or bringing counterfeit coin into the realm, knowing it to be false, with intent to merchandise therewith. I did not apprehend that the famous resolutions of the House of Commons, moved by Sir Edward Coke in 1628, had a saving to this extent *understood*, for the necessities of the State against *suspected* treason. It is this that I have to acknowledge; and if any one shall cast back upon this portion of Part I, I beg him to make the necessary qualification. The main point of that essay was not assisted by the oversight: on the contrary, a juster view of this part of English legal history, in point of fact, would have exhibited in better light the executive character of the power of suspending the writ of Habeas Corpus.

I shall have to introduce this resolution at length from the work in which it is to be found; but I may say in this place, that when Sir Edward Coke verified it himself in the House of

Commons, from the original manuscript book of one of the twelve Judges, who is the reporter, he did not intimate the least opposition or repugnancy to it; and, although he was a high prerogative lawyer, he was notoriously one of the staunchest supporters of Magna Carta, and of the liberties it asserted. He indorsed the principle of the resolution in the time of Charles I, when he was a leader in the Commons against the asserted prerogatives of the Crown. He was Solicitor of Queen Elizabeth when the resolution in the 34th Eliz. was adopted; but he was desirous of acquitting the Lord Treasurer Burleigh of any participation in the abuses which the preamble of the resolution recites, and said it was the *white staves* who made the stir, of which the paper signed by the Judges was the result. Queen Elizabeth, through her Lord Chancellor Hatton and Lord Treasurer Burleigh, was seeking to know, "*what persons sent to custody by her Majesty, her council, some one or two of them, were to be detained in prison, and not delivered by her Majesty's Courts and Judges;*" and the resolution was the definite though covert answer. It was nearly the full equivalent, and was indubitably the lineal progenitor of what has since been called "*suspension* of Habeas Corpus."

While rejecting, in Part I, the analogy of the Suspension Acts of Parliament as a rule for assigning the power of the Habeas Corpus clause in our Constitution to Congress, it may also be thought, that I put these Acts out of view in regard to the elements and limitations of the power. But nothing was further from my design. I rejected them as an analogy for the exercise of the power by Congress, and no further. I adhere entirely to all I said in that paper upon the Executive character and destination of that power in our government, which was then the only subject in discussion. The nature of the power was not in discussion, and hardly under consideration. I have always taken it to be, what I shall now endeavor to show it is. I referred to it then, only collaterally and briefly, as a matter that did not, in my mind, admit of dispute; but I have since found that in this I was very far away from what was to follow.

One of the most curious facts which political history reveals to us is, that in ages remote from each other, and under govern-

ments emphatically professing to defend and maintain liberty, there has been so much uniformity in the adoption of a disguise, to cover the creation of that power which is now in question. Everybody knows, people as well as rulers and framers of Constitutions, that the power is an arbitrary one to a certain extent, and must be so, to meet the immeasurable danger for which it is provided; but because the arbitrariness would be disclosed by defining it, the device of statesmen has been to disguise it in language more or less vague, and, in our case especially, by preluding the prohibition of the thing in one sense, which it intended to authorize in another, neither of which senses was at the same time explicitly stated. From this timidity, or finesse, has sprung an exaggerated apprehension among the people, which would have disappeared, or been reduced to a minimum, by simple plaindealing. If the power had been described in our Constitution in the terms in which the members of the Convention were able to describe it, from a regular administration of it in England, both before and since the Habeas Corpus Act of 31 Charles II, they would have expressly settled the reasonable limits of the power, liberal and large as they must necessarily be, instead of leaving us to grope in the dark, to find out whether the power is this or that, or more or less, and perhaps without ever obtaining absolute certainty as to what it was designed to be. This historical fact is certainly very striking.

In republican Rome, the power intended to be created was *couched*, to use the word in the application of *Sir Edward Coke*, in the gentle phrase, that the Consuls should take care, or do their endeavor, that the Commonwealth should not incur any loss or damage,—*dent operam Consules, ne quid respublica detrimenti capiat*,—a caution of the same tenor that one now gives to a gentleman who is to protect a lady in a railroad car or a steamboat, or to a servant who is to carry a porcelain vessel through the streets. There was no apparent danger to any one in the power, but only protection to the Commonwealth; but as the phrase assigned no limits to the protection, so it prescribed none as to the means of protection. The power, consequently, was applied and held to extend to the prostration of edifices, and to the expulsion of owners from houses and lands, to personal imprisonment, exile and death, without observance of the

usual forms of law. The power was *liber exsolutusque legum vinculis.*

In England, before the Habeas Corpus Act of Charles II, 1679, the power was disguised under one form, which had the sanction of the twelve Judges of England, as early as 1592, in the 34th year of Queen Elizabeth. Since the Habeas Corpus Act, it has been practised under the same form, covered by an Act of Parliament, which has obtained for it the vague name of *suspension of the Habeas Corpus Act.* The name did not of course exist before the act, though the thing substantially did; and even since the act, although the name occurs in commentaries, and in books of reports and treatises, yet there is not an Act of Parliament or a Bill of Rights, or a constitutional ordinance, which names the name of the thing, though many Acts of Parliament sanction the thing which has popularly obtained the name. During a recognized use of the thing in England for one hundred and ninety-five years before the epoch of the Convention which reported our Constitution, it, however, became definite in point of legal description. It has had one form, founded on offences of one grade, and resulting in personal imprisonment without bail or trial, to the end of defending the public safety against treasonable conspiracies and practices; and in this form it was sanctioned by all the Judges of England before the Habeas Corpus Act, and since the date of that act by Acts of Parliament from time to time, restraining the personal remedies of the Habeas Corpus Act. Nothing can be more definite, in at least a general sense, than the thing itself; yet in imitation of republican Rome, it has never been defined or described by express written law.

The statute of Magna Carta was never repealed; and it never became obsolete by non-user, which is not a doctrine of English law; neither was it impaired of its legal and constitutional virtue, by repeated and almost constant violations. Its thirty-five or forty Parliamentary confirmations are irrefragable evidence of these violations; and the greatest number of the confirmations occurred in the reign of King Edward III, who probably was, of all the kings of great character, the most frequent violator of its enactments. It is not to be supposed, however, that the article against arbitrary imprisonment was as frequently

disregarded by the Crown, in the persons of the humble or the middle class, as others of its articles which regulated services and payments; but the confirmations of it in this as well as in other particulars more emphatically, is a proof that, while personal liberty was not much regarded by the Crown in the first century and a half after the Great Charter was enacted, the more frequent violations of it in the reign of Edward III, were by what was called *pre-emption*, *purveyance*, *impressment*, and like violations of property, with a view to gain and revenue. But after the death of Henry IV, who took the crown upon the death of Edward's grandson, when the kingdom was thrown into convulsions by disputed title, which continued for more than seventy years, there is no more heard of confirmations of Magna Carta, not because it was not violated, but because its violations were no longer regarded; and one of the historians of England almost excuses the disregard of personal liberty during that period, and for a much longer time, by remarking, that "in an age and nation where the power of a turbulent nobility prevailed, and where the king had no settled military force, the only means that could maintain public peace was the exertion of such prompt and discretionary powers in the Crown; and the public itself had become so sensible of the necessity, that those ancient laws in favor of personal liberty, while often violated, had never been challenged or revived during the course of near three centuries." *Hume*, chap. 50. Undoubtedly, for a length of time which may be properly spoken of as *ages*, the Crown of England imprisoned, and held in imprisonment, whom it pleased, either upon the plausible pretext of danger to the State, or of public wrong of equally indefinite character.

This practice was not without frequent example in the reign of all the Tudor princes; and we obtain, what may be called a judicial account of it in the reign of Elizabeth, in a report containing the resolution of the Judges, to which I have referred. The practice had had the natural effect of debauching the sense of law and liberty in the princes and nobility of the land, and had led to imprisonment in unlawful and unknown places, to the frustration of justice, and to the discredit of the courts of law. But towards the close of the reign of Elizabeth, when the spirit of moral and religious research was in the highest

vigor, and English commerce had commenced that career which enlarged the minds, and quickened the investigations of the people, in all matters which touched the security of liberty and property, the Queen herself became concerned to ascertain as authentically as possible, what were the limitations of law upon the power of the Crown in regard to arrest and imprisonment without bail, of such persons as the Crown might deem it important to detain in custody.

I mention it as the concern of the Queen, although the report is chary in its representations of the royal interference; but as it records that the Lord Chancellor and Lord Treasurer had required *divers* of the Judges to respond upon the matter, it is quite reasonable to infer that the Queen herself had directed the reference. The case is in an old law book, to be found in libraries of the legal profession; but as the book is not in much modern use, and may not be readily accessible to the reader, I transcribe it here, and translate the first paragraph from its law French, the rest being extracted from the text of the book. The case is taken from "*Reports of the very learned Edmund Anderson*, Knight, late Lord Chief Justice of the Common Bench, London, 1664," and is found at page 297, placitum CCCV.

"Divers persons were committed at several times to several prisons, during pleasure, without good cause; part of whom being brought before the King's Bench, and part before the Common Bench, were, according to the law of the land, put at large, and discharged from imprisonment; by which some (*grandus*) great men, were offended, and procured a commandment to the Judges, that they should not do the like after that: nevertheless, the Judges did not stop (*surcease*), but by advice between them, they made certain articles, the tenor of which followed, and delivered them to the Lords Chancellor and Treasurer, and subscribed them with all their hands. The articles are as follows, *scil.:*

"We, her Majesty's Justices, of both Benches, and Barons of the Exchequer, desire your Lordships, that by some good means some order may be taken that her Highness's subjects may not be committed nor detained in prison by commandment

of any noblemen or counsellor, against the laws of the realm; either help us to have access to her Majesty to the end to become suitors to her for the same.

"For divers have been imprisoned for suing ordinary actions and suits at the common law, until they have been constrained to leave the same against their wills, and put the same to order, albeit judgment and execution have been had therein, to their great losses and griefs.

"For the aid of which persons, her Majesty's writs have sundry times been directed to divers persons having the custody of such persons unlawfully imprisoned, upon which no lawful cause of imprisonment hath been returned and certified; whereupon according to the laws they have been discharged from their imprisonment.

"Some of which persons so delivered have been again committed to prison in secret places, and not to any ordinary or common prisons or lawful officer, as sheriff or other lawfully authorized to have or keep a gaol; so that upon complaint made for delivery, the Queen's courts cannot learn to whom to direct her Majesty's writs; and by this means justice cannot be done.

"And moreover, divers officers and serjeants of London have been many times committed to prison for lawful executing of her Majesty's writs sued forth of her Majesty's court at Westminster; and thereby her Majesty's subjects and officers are so terrified, as they dare not sue or execute her Majesty's laws, her writs, and commandments.

"Divers others have been sent for by pursuivants, and brought to London from their dwellings, and by unlawful imprisonment have been constrained not only to withdraw their lawful suits, but have also been compelled to pay to the pursuivants so bringing such persons, great sums of money.

"All which upon complaint the Judges are bound by office and oath to relieve and help, by and according to her Majesty's laws.

"*And where it pleased your Lordships to will divers of us to set down in what cases a person sent to custody by her Majesty, her council, some one or two of them, are to be detained in prison, and not delivered by her Majesty's courts or judges*, we think, that if any person by her Majesty's commandment from her person, or by order from the council board, or if any one or two

of her council commit one for High Treason, such persons so in the case before committed, may not be delivered by any of her courts without due trial by the law, and judgment of acquittal had.

"Nevertheless, the Judges may award the Queen's writs, to bring the bodies of such persons before them; and if upon the return thereof, the causes of their commitment be certified to the Judges, as it ought to be, then the Judges in the cases before *ought not to deliver him, but to remand the prisoner to the place from which he came.*

"Which cannot *conveniently* be done, unless notice of the cause, *in generality*, or else specially, be given to the keeper or gaoler, that shall have the custody of such person.

"All the Judges and Barons, &c., did subscribe their hands to these articles, T. p. 34 *Eliz.*, and deliver one to the Lord Chancellor, and one other to the Lord Treasurer; after which time there did follow more quietness than before in the cases before mentioned."*

This paper is commonly referred to as the "Resolutions" of the Judges. It calls itself "Articles." As it has but one answer to the inquiry of the Lord Chancellor and Lord Treasurer, it

* Mr. Hallam, in his Constitutional History of England, vol. 1, p. 252, produces from an original manuscript in the British Museum, the copy of a paper sufficiently resembling in parts the report in Anderson, to represent the transaction; but in the resolution it is wholly unlike it. The Museum paper omits altogether the reference to writs of habeas corpus, and the distinctive feature of high treason *in generality*, which is the marking fact of the report. Mr. Hallam supposes that the Museum paper, indorsed June 5, 1591, was revised before its delivery in Easter, 1592; and following Anderson's report, he says, that though the complaints of the Judges are an authentic recognition of personal freedom against such irregular and oppressive acts of individual ministers, the Resolutions "must be admitted to leave by far too great latitude to the Executive government, and to surrender, at least by implication from rather obscure language, a great part of the liberties which many statutes had conferred."

They remained, nevertheless, for eighty-seven years, the law of Judicial administration in the case of Privy Council warrants, so long as England had a King and Privy Council.

appears to be only a single article or resolution; and so I shall generally describe it.

It must be admitted that the report has not exactly the ring of Magna Carta, and 25 Edw. III. The articles were an answer to a special inquiry for some definite process, by which a Privy Councillor might commit a person to prison, to be detained, and not delivered by her Majesty's Court or Judges; and the twelve Judges concurred in pointing out the *convenient* mode; the mode convenient to the Judges, and equally so to the Privy Council. The mode was an executive warrant from one or more of the Privy Council, charging, or certifying to the gaoler, the offence of High Treason, in language that was entirely vague, and which might comprehend either of the seven branches of that offence defined in the 25 Edw. III, or by any subsequent statute. It of course comprehended *suspicion* of High Treason, as Sir Edward Coke will be hereafter found to admit, and treasonable practices; for undefined High Treason is no more than a suspicion of treason, or a treasonable practice. It met all the exigencies of state, in the case of a conspiracy against the realm, not fully developed, nor the parties and witnesses all in hand; and it came within the range of settled law so far, that the Court and Judges could commit or remand for suspicion of Treason or Felony. The peculiarity of the Resolution was, not that they *could* remand, but that they *ought* to, and, therefore, *would*, definitively and absolutely. Trial was certainly professed to be at the end; but when would the end be, without a Habeas Corpus Act, with a Privy Councillor as committing magistrate, the Attorney-General as prosecutor, and a general charge, requiring a new detainer, a new commitment, or a new specification by indictment? The imprisonment was practically indefinite.

I shall have to notice this case from Anderson again, in a very memorable contest.

Thus stood the law under the old Constitution of England, as to arrests and imprisonments by the Privy Council and Secretaries of State for general and unspecified High Treason. There was no danger of state, whether there was rebellion or invasion or not, in which the Crown could not issue a warrant to arrest and imprison a suspected traitor or conspirator of treason, and hold him imprisoned with practical indefiniteness;

and the method, though covered from the eye of the unlearned, was wholly executive, and definite in the mode of process, though generally indefinite in the description of the offence charged in the warrant or certified to the gaoler.

Under the Habeas Corpus Act of 31 Charles II, the device was frustrated, for the first time, by an express provision in the second section of the Act, which made *all prisoners* accessible by writs of Habeas Corpus, for all criminal or supposed criminal offences, and bailable, *unless* the commitment was "for felony or treason, *specially and plainly expressed*" in the warrant of commitment; and if that act had not been passed at all, we might not have heard of the words, *suspension* of Habeas Corpus, though England would still have had the thing; nor of Acts of Parliament to remove the impediments of the Habeas Corpus Act, out of the way of similar commitments by the Crown in times of public danger. Ever since the Habeas Corpus Act, the commitments by the Crown, which the Acts of Parliament are necessary to sustain against the operation of the Habeas Corpus Act, are from the same source, the Privy Council, in the same form, and to the same effect, and by the like authentication, as before; and, therefore, remain under the same cover, although commentators give them the name of "suspensions of the Habeas Corpus Act," in consequence of the Acts of Parliament which follow and sanction them, prohibiting the delivery or trial of prisoners, under such commitments, for a specified time.

I may, therefore, describe "suspension of the privilege of the Writ of Habeas Corpus," as having been under the old Constitution of England, and as being under the new since the epoch of the Revolution, a proceeding by the Executive power of the Government, in times of public danger, consisting "of a Warrant of Arrest and Imprisonment for High Treason, suspicion of High Treason, or treasonable practices;" that is to say, charging an offence against the majesty of the state, by which the prisoners were held without bail, before the Habeas Corpus Act, indefinitely to all necessary purposes of state, and definitely in point of time since the Habeas Corpus Act, by a Parliamentary prohibition of bail or trial, which the Habeas Corpus Act would otherwise allow by force of the exception in

the second section. I repeat, that, in my apprehension, the difference of the course and practice in the two conditions of the English Constitution, old and new, arises from the Habeas Corpus Act of 31 Charles II. The suspension of the privilege is substantially the same thing in both, in the executive body from which it proceeds, in warrant, in description of offence on which it is founded, in effect, and in design to protect the public against extreme danger. Take away the Habeas Corpus Act, and the Parliamentary interposition would be superseded as unnecessary; and the power would remain to the Executive department of the Government, as before, except in the single point of a practically indefinite postponement of bail and trial, instead of a specific and limited one.

If this account of what is called "suspension of the privilege of the Writ of Habeas Corpus" is true of the thing in England, there would seem to have been no difficulty in describing it intelligibly and certainly in our own Constitution, or in annexing any further conditions to it which may have been thought proper. In England, it is a discretionary power to arrest persons for high treason, suspicion of high treason, and treasonable practices, and to imprison, and to hold them imprisoned, without bail or trial; but it is not limited by any specific condition of the country,—either rebellion, or invasion, or any other overt danger or disturbance; but was exercised before the Habeas Corpus Act, at the pleasure of the Crown, and has been exercised since the Act, at any time when Parliament has seen fit to put aside the impediment of the Act. Such a power, unconditioned by the overt danger of the nation, might reasonably be thought, and was thought, inadmissible among us; but the power itself had been deemed a lawful power before that Act, and was subsequently thought to be an indispensable power in certain conditions of the country, even by those who did not see fit to leave it in the sole possession of the Crown. It is a proceeding founded on the alleged crime or offence of *treason* against the majesty and safety of the nation; neither more nor less. It has no other basis whatever, and never has had. This has always been, in England, the pivot or hinge of denial of bail and trial, and is so at this day, with no other difference between the day of 34 Eliz. and the present

day, than that between indefinite delay of bail and trial, and a specific and limited delay, renewable *ad libitum;* but, from the critical danger of such a crime at certain seasons, instead of a charge of special or plainly expressed treason, general or suspected treason has been deemed a sufficient charge to justify the arrest and imprisonment, in defeat of conspiracies or confederacies against the nation.

All this being known to our forefathers, how remarkable it is, that they should have treated the subject with such extraordinary coyness, as the record of their proceedings shows, doing the work by implication instead of distinct and full expressions, and finally bringing it into the Constitution as it were by a by-way, and under something like a cloak, instead of a plain and well-fitting vesture, which would have shown its true shape to everybody.

I have stated in Part I of these remarks, that a suspension of Habeas Corpus was provided for in a plan or outline of Government, which was laid before the Convention, as the Journal says, by Mr. Charles Pinckney. Whether the printed Journal is right in this fact, is wholly immaterial. Mr. Pinckney subsequently assumed a distinct and particular relation to the subject.

On the 29th May, 1787, the first day of business in the House, certain propositions of Governor Randolph, of Virginia, with Mr. Pinckney's plan, were referred to a Committee of the Whole on the State of the American Union. (*Journal*, 71.) In this committee certain of the fundamental propositions of Governor Randolph were discussed, amended, adopted, or postponed, from day to day, until the 13th June, when certain resolutions were reported to the House. (*Journal*, 81–122.) The provision in regard to Habeas Corpus was not noticed in them in any way. On the 15th June, other propositions were moved by Mr. Patterson, having no relation to Habeas Corpus, and were referred to the same Committee of the Whole. (*Journal*, 123.) On the 18th June, Colonel Hamilton read in the Committee of the Whole, in the course of his speech, his plan of government, which did not embrace the subject of Habeas Corpus. (*Journal*, 130.) On the 19th June the Committee of the Whole reported to the House the propositions of Governor Randolph, in the form of certain resolutions, and reported also that

they rejected the propositions of Mr. Patterson. (*Journal*, 136.) Until the 26th July the House debated, amended, adopted, or rejected these resolutions, and considered from day to day other motions and propositions, covering the whole field of the Constitution, except what regarded the suspension of Habeas Corpus; and on that day, referred the resolutions of the House, which had been adopted, in number twenty-two, to a Committee of Five, to report a Constitution, and with certain instructions to the committee, contained in a twenty-third resolution, but not in reference to Habeas Corpus. (*Journal*, 206–207.) And this Committee of Five, on the 6th August, to which day the Convention had adjourned, reported to the House a *Draft of a Constitution*. (*Journal*, 215.) From the 6th to the 20th of August, the House was occupied from day to day with the Articles of the Constitution so reported, amending, supplying, adopting, or rejecting them, but in no respect touching the subject of Habeas Corpus. (*Journal*, 230–263.) On the 20th August, for the first time, the subject which three months before had been referred to in the sixth article of Mr. Pinckney's plan, in these words: "*Nor shall the privilege of the Writ of Habeas Corpus ever be suspended, except in case of rebellion or invasion,*" was, with other propositions, referred to the Committee of Five, in the words following: "*The privilege and benefits of the Writ of Habeas Corpus shall be enjoyed in this Government in the most expeditious and ample manner; and shall not be suspended by the Legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding —— months.*" (*Journal*, 264.) On the 22d August, the chairman of the Committee of Five, reported certain additions to be made to their report before the Convention; but did not in any way notice the proposition or clause in regard to the privilege of the Writ of Habeas Corpus. (*Journal*, 277.)

Thus for nearly three months of the session, the Convention and all committees, general and special, had left the subject of Habeas Corpus without action; and the last committee, who had reported a draft of the Constitution, may be said to have put it aside. No one appeared inclined to touch it, except, perhaps, the delegate who had first introduced it in his plan on the 29th May; although it is Mr. Madison, in his Debates, and not the

Journal, which makes this certain. The Journal records, that on the 28th August it was moved and seconded in the House, and passed in the affirmative, to add the following amendment to the fourth section of the eleventh article, which constituted the *Judicial* power: "*The privilege of the Writ of Habeas Corpus shall not be suspended, unless where in cases of rebellion or invasion, the public safety may require it*" (*Journal*, 301); which, substituting *when* for *where*, is the precise language which is now contained in the second clause of the ninth section of the second article of the Constitution, as it was adopted and engrossed.

Mr. Madison, in his "Debates in the Federal Convention," represents it as being moved on the 28th August, by Mr. Pinckney, in nearly the form contained in that proposition, which had been referred to the Committee of Five, and upon which the committee had not reported; but he does not say how the motion was disposed of. It may not have been seconded. He states that *Gouverneur Morris* then moved it in the terms recorded in the Journal; that the first member of the clause, to the word *unless*, was agreed to *nem. con.*, and the remaining part by 7 States against 3: *New Hampshire*, *Massachusetts*, *Connecticut*, *Pennsylvania*, *Delaware*, *Maryland*, *Virginia*,—aye 7. *North Carolina*, *South Carolina*, *Georgia*, no 3. The Journal has probably incurred an error of the press in applying this division, not to the *fourth*, but to the *fifth* section of the eleventh article, which Mr. Madison says passed *nem. con.*, as no doubt it did, being the article relating to judgment in cases of impeachment.

It is quite consistent with such a history of the clause, that its final adoption should be attended by no intelligible debate; for although Mr. Madison is clear in what he reports of it, the debate itself has not the least tendency to show what, in the judgment of any delegate, was meant by the clause.

Mr. Morris, who moved the clause, is not reported by Mr. Madison to have said a word in explanation of it.* The whole

* I have heard it surmised that this was one of Gouverneur Morris's judicial amendments or articles to which this eminent man refers in a letter to Timothy Pickering, to be found in Dr. Sparks's Life and Correspondence of Gouverneur Morris, vol. iii, p. 322; but this must be wholly conjectural.

Timothy Pickering, while a Senator from Massachusetts, asked Mr. Mor-

history seems to show that there was, what Mr. Thackeray in one of his writings calls, *a skeleton in the closet;* which he says every Englishman has, and which every delegate seems to have had, and feared to see, or to exhibit in its bones and articulations, lest it should frighten the country. Though it is by no means an agreeable thing to look upon, there would have been less to alarm us if it had been shown in its true parts and proportions; for the imagination would have had less scope for exaggeration or perversion. It had been so veiled, however, in the Convention, that the authors of the Federalist did not think it expedient to lift the veil, or to breathe its name, in their great Apology.

Even Mr. Morris's very sound general rule for the interpretation of the Constitution, "that it must be done by comparing the plain import of the words with the general tenor and object of the instrument," is not easily followed in the interpretation of this clause; for if the words are plain, the import of them is not altogether so to the general reader, and there are very few of them to reflect light upon each other. The general tenor and object of the instrument, moreover, do not give particular and direct aid in the solution; for there is little, in any part of the Constitution, that has a clear affinity to them. A verbal analysis, without definitions or explanations *ab extra*, which, after all,

ris, by letter of December 25, 1814, in the same work, his account of the proceedings in Convention in regard to that part of the original money-borrowing clause, which authorized Congress to "emit bills of credit," and which had been struck out upon Mr. Morris's motion. The whole answer may be referred to in the Life. The following is an extract of the part which relates to his judicial amendments or articles.

"Propositions to countenance the issue of paper money, and the consequent violation of contracts, must have met with all the opposition that I could make. But, my dear sir, what can a history of the Constitution avail, towards interpreting its provisions? This must be done by comparing the plain import of the words with the general tenor and object of the instrument. That instrument was written by the fingers which write this letter.

"Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit, *excepting, nevertheless, a part of what relates to the Judiciary.* On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which, expressing my own notions, would not alarm others, nor shock their self-love; and, to the best of my recollection, this was the only part which passed without cavil."

may contain the whole marrow of the discordant interpretations, will amount to nothing, as may very easily be shown.

The *first* member of the clause says, that "the privilege of the writ of Habeas Corpus shall not be suspended;" and the second member says, "unless when in cases of Rebellion or Invasion, the public safety may require it." This we may suppose for the present, authorizes suspension of the privilege in such cases. But the express words authorize no more.

Suspension of the privilege of the writ of Habeas Corpus, is nothing to a man who is not imprisoned; but the clause expresses nothing in regard to imprisonment.

Imprisonment is not predicable in law of anybody without an offence or cause; but the clause expresses nothing in regard to cause or offence.

An offence is not amenable to law without an arrest, nor an arrest without a warrant or authority, or a magistrate to command; but the clause expresses nothing in regard to warrant, arrest, or authorizing magistrate.

The clause, therefore, in words prohibits suspension of the privilege of the writ absolutely, and authorizes it conditionally; and if it means no more than it expresses, the sense and the efficacy of the whole are suspended more explicitly than the privilege of the writ.

But we see, at the same time, that the clause was devised for the public safety, and that suspension was both prohibited and allowed for it; and not allowed for the public safety at all times, but only in times of disorder, during civil commotion and public resistance against Government, or during public war in hostile contact with it. It is not a *war* power, a power to increase military strength or equipment, to assist a military draft or enlistment, or it would have been given *coextensively* with war. It is a *rebellion* and *invasion* power, to suppress treason and criminal disloyalty, when an enemy is within our own borders, dividing us by our interests and fears, and ensnaring us into treachery against the Government that protects us, and which we in return are bound to support and defend. It must, therefore, be regarded, consistently with the tenor and object of the Constitution, as a provision for great and rare cases of public or national disturbance. It must also be regarded, in the field or character

of its operations, as a definite power, and not an indefinite one, which is utterly at variance with the tenor and object of the Constitution; a definite one, carrying all the power that is necessary to make the provision effectual against the danger, which was its moving cause. And if this can be made out by reasonable and probable implication from the words, it will be the same thing as if our forefathers had explained them, as I, for one, humbly and respectfully think they ought to have done. It is the expedient of only a timid horseman, to put a blind upon his horse, to keep him from shying or lashing out at what he is not accustomed to see. Experience shows that the better way is to let him see and examine the thing all round and square before him, and then he will learn how much exactly he ought to fear it, and will fear it no more than he ought to do.

The elements from which the clause is compounded are not many, and they must come fully as much from without the clause as from within it; nay more, for nearly or quite all the aid that the clause itself affords to explain its meaning, is in the contrast between its first and second members; while at the same time each member of the clause either expressly or by necessary implication contains within itself the unexplained word "suspended," on which the whole question turns, and which can alone be explained from without.

At the time this clause was moved in the Convention, there was one *exemplar* of similar power in England, of which kingdom we had been Colonies. But that power was altogether unconditioned by the state or circumstances of the nation in which it could be used. It was exercisable at all times in war, in rebellion, in peace, and in times of general order and quiet. In point of source, both before and after the Habeas Corpus Act of 31 Car. II, that power began with the Executive, the King, and was exercised by a warrant from the Privy Council, or from a Secretary of State, charging the person named in it with High Treason in general terms, or suspicion of High Treason, or treasonable practices, and ordering his arrest and commitment to close custody. It was intended to meet and frustrate secret or suspected conspiracies against the safety and majesty of the realm. When the second section of the Habeas Corpus Act made all such commitments for general treason *bailable*, the

power of the Privy Council and Secretaries of State did not cease, but the efficacy of their warrant ceased, except as a commitment that would end upon giving a recognizance of bail to appear and stand a trial; and when it was thought expedient to prevent bail and trial for a future period definitely, it was necessary that an Act of Parliament should intervene, to arrest the operation of the Habeas Corpus Act in regard to commitments or imprisonments under such warrants; and it was from these Acts of Parliament came the expressions, "suspension of the Habeas Corpus Act," "suspension of the Writ of Habeas Corpus;" and like expressions in regard to the Writ, of which the word "suspension" was the key. *Suspension* uplifted the Writ of Habeas Corpus from imprisonments under warrants of arrest from the Privy Council for general or suspected treason.

There was, at the same time, another *exemplar* of this power in the Constitution of Massachusetts, adopted in 1779; and this, like that of England, was unrestrained by any conditions, in regard to the circumstances of the State, in which it could be used; but was confided in terms to the legislature of the State, to be used only on "the most urgent and pressing occasions," and for a term or time not exceeding twelve months. I have not found any other examples of the clause, anterior to the Convention which reported the Constitution of the United States. Of course I have not looked for examples to the countries of Europe, where personal liberty is generally regulated by forms different from our own.

And to these facts we must add the indisputable fact, that the Constitution prohibits suspension in the largest sense in which it had been used, that is to say, without any conditions manifesting a particular state or crisis of the country; and authorizes it under the conditions it annexes, "when in cases of Rebellion or Invasion the public safety may require it;" and that it contains no express reference to the Legislature or Congress, nor any limitation of time, further than Rebellion or Invasion, which limits the suspension, is itself limited by time.

The language of the clause, and these external facts, seem to be all that can be obtained, and are probably all that is necessary by the usual rules of interpretation, to ascertain the definite meaning of the provision.

I repeat, the *definite* meaning. I must not be understood to mean absolutely and in all points so *definite*, as that the department that was intended to initiate or exercise the power, should be ascertained from the appointment of the clause itself; for although it may be regarded as the general tenor of the Constitution to indicate by classification or otherwise, what department in particular shall execute the power which it grants, and this is perhaps uniformly the case in regard to legislative and judicial powers, yet it is not true of executive powers in detail, the Constitution vesting the Executive power, *as a whole*, in a President of the United States, and making no detail, except where the President is to act in conjunction with the Senate, or in convening the two Houses, or either of them, and adjourning them if they disagree, or in receiving Embassadors or other public ministers. The office of Commander-in-chief of the Army and Navy of the United States, is not an inference from the Executive power being vested in him, but is conferred by express grant; and so is the power to grant reprieves and pardons. Whether a power, not given expressly to Congress or to the Judiciary, is an executive power and vested in the President, is in general to be determined by the nature of the power itself, and not by its being expressly assigned to that department. Without an express appointment, the power will result to the Executive, if it is an executive power; and so it may result to Congress, I admit, if it is a legislative power, though Congress be not expressly appointed to the duty,—a much rarer case however, under the Constitution.

But by *definite*, I mean definite as to the *power* comprehended by the clause, which if it be nothing but the uplifting of the privilege of the Writ, without regard to its antecedents, is, as I have shown, illusory and vain. I mean, consequently, definite as to the whole power, including its antecedents, the imprisonment, the cause of imprisonment, and the warrant of arrest and commitment. If it is not this—if some one of the departments is left to declare or designate afterwards the cause for which, and the warrant of arrest and imprisonment by which, the privilege shall be suspended—then I apprehend, that nothing can be less conformable to the tenor of the Constitution than such an indefinite grant of power, and nothing more dangerous to the liberty of

freemen. Nothing, in my judgment, is more repugnant to the spirit of the Constitution, than a grant of such indefinite power as this, whether in cases of Rebellion or Invasion, or in any season more critical to the state, if such there can be.

My impression is that the clause can be shown, by following the established rules of construction, to have a clear meaning, *definite*, *limited*, and *safe*, so far as a power in any degree arbitrary over the liberty of a freeman can be safe; and that no further legislation by Congress is either necessary or competent, unless it may be thought more in conformity to our plan of Government, that Congress rather than the Executive shall initiate the exercise of the power, or determine its continuance. I do not myself adopt this exception, but my remarks will not absolutely exclude it.

I proceed, therefore, to state, perhaps all the questions which necessarily arise under this clause, and to make the remarks which they appear to me to call for.

I. *The action of the clause.*—Does this clause *give power* to any department of the Government to suspend the privilege of the Writ of Habeas Corpus, when in cases of rebellion or invasion the public safety may require it?

This has been denied. In every paper that I have read, which has been written in opposition to my own suggestions, this denial has been the principal, if not the exclusive ground of remark. It is asserted in these papers that no power is given by the clause; and that it is exclusively a restriction upon an implied general power of suspension which the Constitution had previously given to Congress. The clause is alleged to be a mere restraint upon power, and not a power. Power, it is said, is denied by the clause, but not created or given.

This is an extreme position, for which no authority or corroboration has been vouched from any one in high judicial station, or from the general scope of the Constitution itself. It is assumed principally from the position of the Habeas Corpus clause in the ninth section of the second article of the Constitution, which is said to be a collection of restrictions upon powers before given, expressly, or by implication.

In opposition to this, the late Chief Justice *Taney* expressly derived the power of suspending the Writ of Habeas Corpus from this clause, and from no other part of the Constitution. This he did in his opinion expressed in *Ex parte Merryman.*

The able and learned Judge *Sprague*, of the District Court of the United States for the State of Massachusetts, in the cases *Ex parte Fagan* and others, September, 1863, said expressly: "The Constitution, in declaring that the privilege shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it, has in effect declared that, in such cases, it may be suspended."

There is no express power in the Constitution to this effect, except this clause; and as to implied powers, the late Judge Story, in his commentaries upon the Constitution, has made an elaborate argument upon the implied and incidental powers of Congress, which manifests his opinion that such a power cannot be found there, although he does not appear to have regarded the supposition as possible, that it was among the incidental powers. In his remarks upon the subject, sec. 1342, the learned Judge says: "It would seem, as the power is given to Congress to suspend the Writ of Habeas Corpus in cases of rebellion or invasion, that the right to judge whether the exigency had arisen, must exclusively belong to that body." I need not remark, at present, upon the two assumptions in this sentence; but it is clear, that all the power of suspension that he regarded as existing under the Constitution, is in this clause and nowhere else.

A power, supposed to be either generally or extensively given to Congress, to suspend the privilege of the Writ of Habeas Corpus as a necessary and proper instrument or means to effectuate some or all of its express powers, is no less than a power to suspend *Magna Carta*, in pretty much the only principle in which it survives. The gift of such a power for such common and ordinary ends, would be to sacrifice the fundamental principle of free government, as a means of carrying into execution the regular operations of government. All reasonable presumption is against it.

So it has been said, that the writ of Habeas Corpus is a judicial writ, and that a power to give it, includes the power to take it away, and to leave a party without any remedy for a time, or indefinitely; that is to say, that a power coupled with a trust

to organize tribunals inferior to the Supreme Court for the exercise of the Constitutional Jurisdiction, includes a power to disorganize them, and to leave them without the means of exercising jurisdiction. This is extraordinary ground upon which to raise the implied power in question. But uplifting the writ, without taking it away, is the implication which is in question. It is the suspension of action while the writ remains. This is not a legislative nor hardly a judicial power; it is neither bailing nor trying the prisoner, but simply doing nothing but leaving him as he is. It is clearly an executive act, as much as suspending him to a beam, without any judgment how long he is to hang there. I deny that Congress can take away the writ, without violating their constitutional trust, and therefore the power to take it away cannot be implied; but whether this can or cannot be done, to leave both the jurisdiction and the writ, and to have an implied power to suspend the exercise of both, as a necessary and proper means of executing their express power, has as little reason to support it as can be said of any other proposition whatever.

The power to suspend this privilege is not, properly speaking, a legislative, but a constitutional power; and is not comprehended within the legislative powers of the United States, either as a means or as an end. Legislative powers are in their nature and design regulative and conservative, to oppose diminution or injury, or to promote progress, and not to impair foundations of government. This does not mean that the people who made the Constitution, could not confer such a power, and reasonably confer it, to prevent the overthrow of government; but there is a violent presumption against the grant of such a power unless it is plainly granted. So far as the power extends, it is an unsettling power, and in whatever degree it is used, is so far destructive. Under a government of granted and limited power like this, no implication from those powers which reason can suggest, will carry with it an authority to suppress personal liberty arbitrarily; for the right of personal liberty in every freeman, is the constitutive principle on which the Constitution itself depends. Such a power is not an incident of anything that is granted, but it is the reserved foundation of all that is

granted. The silence of the Constitution, therefore, when it does not speak plainly upon such a point, is a negation and prohibition of the power.

The clause in the ninth section of the second article, is a plain grant of the power, under the conditions which it prescribes. It is plain, according to the well-known and universally accepted idiom of our language. The whole language of the clause, taking both its members together, is, according to that idiom, expressly prohibitive of the power unconditionally, but plainly affirmative and donative of the same power under certain conditions. The first member of the clause prohibits the power in its general or unconditioned state, without regard to rebellion or invasion; and the second member by the disjunctive conjunction reverses the first, so far as to authorize it under essential conditions. It is a well-known idiom of our language, and of most languages; and is in common use, when it is intended, in a condensed manner, to affirm and deny something at the same time, in different aspects; and this is such a use, as the law takes notice of in the interpretation of statutes, and of the most solemn covenants. It is the "*jus et norma loquendi*," the "*loquendum ut vulgus*," which is a popular and universal right, and held in respect by the law.

Writers have said that the first paragraph of the ninth section of the second article of the Constitution is restrictive of the commercial power of Congress, which is true; and they repeat the averment, as a sort of consequence, that the second paragraph, the Habeas Corpus clause, is also restrictive of an implied power in the same body. But nothing can be poorer as reasoning: for the two paragraphs have not the least connection or dependency.

They also say that the ninth section of the second article of the Constitution is wholly composed of restrictions; which, if it were true, would not help the argument. They must also prove, that it is wholly restrictive of powers before granted, which is not true. The Habeas Corpus clause does undoubtedly contain a restriction; but it is of no use to their argument. The second member of the clause restrains the operation of the first, as it is the nature of a clause of this structure to do al-

ways, and by so doing to contradict and reverse the first, partially, and to adopt it with a qualification.

The notion that the restrictions in the ninth section imply the previous grant of a power to be restrained, cannot be better exposed than it is by the last clause of the *tenth* section of the same article, which is wholly composed of restrictions upon the States. "No State shall without the consent of Congress lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, *or engage in war*, UNLESS *actually invaded, or in such imminent danger as will not admit of delay.*" Can these writers show that the Constitution has anywhere given the States a general power to engage in war, of which this is a restriction? On the contrary, the prohibition to make war unconditionally is contained in the *first* member of the sentence, and is granted conditionally by the *second* member of the sentence: precisely as in the Habeas Corpus clause. The State war-clause is in structure and grammatical effect, precisely the same as the suspension clause. It prohibits a right in the States to engage in war, without the consent of Congress, but affirms it conditionally when actually invaded, or in such imminent danger as will not admit of delay. The two clauses are twin brothers from the same matrix, and were doubtless prepared and fashioned by the same person. It is perhaps the most common and concise form known to our language, of prohibiting an unconditioned act or power, and in the same sentence authorizing it conditionally.

When the nature and the history of the clause are considered, few, it is presumed, will doubt that the negative form was given to the first member, mainly to avoid a very open and direct affirmance of this abnormal and dangerous power; and that as no power of suspending the privilege is given to Congress as a necessary and proper means to carry their express powers into execution, established principles of interpretation justify the construction, that the clause does, in the conditions prescribed, confer upon some department of the Government, a power to suspend the privilege of the writ of Habeas Corpus, whatever that may mean.

II. *What is the extent or range of the power that is given?*

In looking for that meaning, where the words are so imperfectly defined, it is not unworthy of remark, that the negative expression, in the *first* member of the clause, "the privilege of the Writ of Habeas Corpus shall *not* be suspended," seems to imply, that at least somewhere, or at some time, the privilege had been or might be suspended in manner or form, or at a time, or under circumstances, which the makers of the Constitution did not approve, and intended to reject and prohibit. It is not the language which would have been used, if the thing had been unknown and unprecedented, nor if the precedent which was known had been altogether approved. A provision, either adopting an approved precedent, or introducing a new one, would more naturally have assumed an affirmative form. And this is made more clear by the conditions of Rebellion or Invasion, which the *second* member of the clause introduces as a qualification of the negative, to fit it for use in our own Government. These conditions of the Union, "rebellion or invasion when the public safety may require it," are the only qualifications which the *second* member of the clause introduces, to authorize what the *first* member of the clause prohibits: and if there was a known precedent, which wanted these conditions or qualifications, but possessed intrinsically the other elements which constitute suspension of the privilege, we may reasonably suppose that it was the intention of the clause to adopt and prescribe these as the intended proceeding, unless we can find some authoritative interpretation of its language, which we are compelled to follow in the place of any precedent.

The words *suspended* and *suspension*, are not technical, that is to say, are not so defined in any written law or judicial decision, in regard to the Writ of Habeas Corpus, or to the privilege of the Writ, as to compel us to follow the definition as the basis of interpretation. We know that they are not applied to questions of Bail or Imprisonment, upon Writs of Habeas Corpus, in the ordinary or normal administration of the law. A decision upon such questions may be postponed, adjourned, or appealed to another time, or term, or court; but

the word *suspension* or *suspended* is entirely unknown in reference to such disposals of a question of Bail upon arrest and imprisonment. If we attempt to interpret the Habeas Corpus clause by what may be learned from the normal administration of law, we can get no light whatever to guide us. But historically, politically, and naturally, the words have a meaning, in reference to abnormal arrests and imprisonments, and to an uplifting of the privilege or benefit of the Writ, beyond the reach of parties or ordinary law, and resulting in simple imprisonment and denial of bail and trial, for the safety of the nation, against suspected persons in times of critical danger. We come nearest to a true account of it in the first volume of Blackstone's Commentaries, where he describes the power given by Acts of Parliament to suspend the Habeas Corpus Act, as an authority "to imprison *suspected* persons, without giving any reason for so doing:" 1 Bl. Com. 136. If he had said "persons suspected of a crime against the majesty and safety of the state," the description would have been better. And for such a proceeding the Constitution had a precedent, to which we both may and must refer, from the want of anything else to refer to, in pursuit of its meaning. I do not mean that it is a precedent to be followed literally and with servility, especially in matters which depend upon the structure of the government in which it prevailed, or upon special laws of that government, which required them to counteract another law of the same government, but to be followed in its essential elements, those constituent parts of offence, of process, and of imprisonment, the cause, instrument, and effect, which are necessary to give certainty of operation, or certainty of meaning, to the clause in the Constitution. Such a precedent, I say, was to be found in the practice of England, both before and after the Habeas Corpus Act of Charles II; and that this was in the view of the clause, will be made more obvious by an analysis of the clause itself, and by a consideration of some of the interpretations of it, which must be assumed for the purpose of giving a wider power under it, to some department of our Government.

A material consideration in the analysis of the clause, is its peculiar structure, to which I have already adverted; and from which it follows, that whatever be the power or thing that is

prohibited unconditionally by its *first* member, the same power or thing precisely, neither more nor less, is authorized by the *second* or last member, *under the conditions it prescribes.* This is both clear and necessary by grammatical construction, and therefore in the design of the Constitution.

If the *first* member of the clause is to be interpreted in a universal sense, or abstractly, without reference to cause, condition, or restraint of any kind; that is to say, if it means to declare that the resort to the writ of Habeas Corpus shall not be suspended or denied in *any case, or for any cause,* then the *second* member of the clause affirms and authorizes the suspension or denial in any case, or for any cause, when in cases of rebellion or invasion the public safety may require it. If there is no reference to any case or cause in the *first*, there is none in the *second.* If there is no limitation in the application of the prohibition, there is none in the application of the power while the conditions exist.

The same is true if the *first* member of the clause is interpreted in a general sense; that is to say, largely and comprehensively, but with certain exceptions well known and established, as crimes, not bailable by law, or certain vocations or professions of men, which must be excepted by implication, then the *second* member of the clause authorizes the suspension or denial, except in the excepted cases.

Again: if the *first* member of the clause is to be interpreted in a special sense, or as referring to a special or abnormal power, without conditions, then the special or abnormal power is authorized by the *second* member of the clause, with the new conditions prescribed. And if the meaning of the *first* member of the clause is, for any reason, specific or definite, in point of offences or causes of suspension, then the power authorized by the last member is definite or specific in respect to those offences and causes, and extends no further. In other words, precisely what is unconditionally prohibited by the first member of the clause, is conditionally allowed and authorized by the second, neither more nor less.

In this view of the nature or character of the whole clause, the interpretation of the first member of the clause becomes the leading and governing inquiry; and the true meaning of the

first member of the clause decides the meaning of the second under the conditions it annexes.

There is a point for construction in the *second* member of the clause, which also requires consideration, though it is not so material. In the Journal of Convention, and also in Mr. Madison's debates, the adverb is *where*. In the Constitution, as it was adopted and engrossed, it is *when*,—"unless *when* in cases of rebellion or invasion the public safety may require it." We must take it as it now stands in the Constitution. *Where* is an adverb of *place*. *When* is an adverb of *time*. In the Journal it is more applicable to cases of occasional danger from individuals, or causes, than to the time or season of rebellion or invasion. In the Constitution it is equally applicable to the time or season of rebellion and invasion, and to special, local, or individual cases of danger. But whichever be the word, *when* or *where*, the probable intention appears best to accord with the word which is found in the engrossed Constitution, and to require both that rebellion or invasion shall exist, and *also* that the public safety shall require the particular exercise of the power. This, however, is not very important. The judgment or opinion of the department that executes the power, as to safety or danger at the time, must govern, within the intended limits, and be beyond the reach of examination and correction by any other department.

What was it then which the *first* member of the clause intended to prohibit?

I will state in general terms my apprehension of the meaning of the whole clause, not as proved, nor to be granted without proof, but only as a guide to what follows. "Suspension of the *privilege* of the writ of Habeas Corpus," "suspension of the *writ* of Habeas Corpus," "suspension of the Habeas Corpus Act," are all of them expressions of common import, so far, at least, as to signify a particular condition, namely, that in which the government of a State has, or exercises, a power to imprison, without bail or trial, persons dangerous, or suspected of being dangerous to the State, and who are well described as being guilty or suspected of treason or treasonable practices. This power the *first* member of the clause means to prohibit at all times in its *unconditioned* state; that is to say, when there is

neither rebellion in the nation, nor invasion by war; and this specific power the *second* member of the clause means to authorize, when, *under the condition* of rebellion or invasion, the public safety may require it.

I am able to conceive of but three interpretations of the *first* member of the clause, as presentable by any one:

1. That the words prohibit the suspension and denial of the writ of Habeas Corpus and bail, trial, or discharge in all cases; that is to say, *universally*, or abstractly, without reference to cause, condition, or restraint.

2. That they prohibit this suspension or denial *generally*, except in certain cases authorized by ancient statutes, adopted or followed in the Colonies, and necessarily implied, and therefore excluded from their meaning.

3. That the words have a special reference to an abnormal, and generally unconstitutional proceeding, known in England under substantially the same name or description, and which, from its unrestricted use or liability to use when there is neither rebellion nor invasion in the country, ought to be disallowed unconditionally in this government.

1. The first interpretation of the *first* member of the clause, that the words prohibit the suspension of the writ, and the denial of bail, trial, or discharge, universally, though it is apparently literal, is altogether inadmissible. It is to this effect, that the writ of Habeas Corpus shall, in all cases and at all times, be enjoyed by all freemen.

Technically speaking, the first member of the clause does not prohibit the denial of bail, trial, or discharge. It prohibits the *suspension* of the right to demand the benefits of the writ. Undoubtedly the result of suspension is, that the party does not enjoy the benefit of bail, trial, or discharge; but he is not denied it, as he is by the normal operation of law, when the bail or discharge is taken away by statute, or by a principle of law; but because he is within the operation of an exceptional principle, which hangs up or uplifts his personal right for the sake of public safety. It is not denied simply, as it is by ordinary law, but the privilege is hung up by force of the extraordinary law.

The interpretation first presented puts aside this considera-

tion, and treats the first member of the clause as a universal prohibition of the suspension or denial of the full use of the writ of Habeas Corpus and its benefits. This, I have said, is inadmissible. It offends against laws and facts universally observed and known, and which it could not have been the design of the Constitution to repeal or disturb.

It was perfectly notorious at that time, that there were, and must always be, masses of freemen in this country and everywhere, under laws derived from England, where the Writ of Habeas Corpus is known, whose privilege of the Writ of Habeas Corpus to obtain discharge from confinement is, and must be, suspended for the time by their vocation and duty, and this in conformity to the necessary law of peace as well as of war. I mean the class of soldiers who belong to the army, whether voluntarily enlisted or drafted, or militia called forth into the public service. The same is also true of those in the naval service. They are freemen, though they are soldiers, marines, or seamen, but they are under restraint and confinement to military or naval duty. Whether they are duly or lawfully made soldiers, marines, or seamen, is a question of the law of the land; and the privilege of the Writ of Habeas Corpus is one of their privileges to investigate the grounds of their denial, if, while under confinement, they deny that they have been lawfully enlisted, raised and called, or drafted. But if they are lawfully soldiers, marines, or seamen, they are and must be subject to the rules and articles of war and of the navy, and their privilege of the Writ of Habeas Corpus is suspended. The general benefits of the Writ of Habeas Corpus, as the Convention and the people knew, are uplifted from them, according to any law either of England or the Colonies; and therefore the Constitution did not mean by this clause to prohibit the suspension or denial of the Writ, and the benefits of it, in all cases universally. So also it was known to the Convention, that before Magna Carta, and after, though by the common law all offences were bailable, yet since the Statute of Westminster I, and subsequent statutes of early date, treason and capital felonies were not and are not bailable by law; and that parties accused and imprisoned on account of such crimes had not, strictly speaking, the privilege of bail, or of the Writ of Habeas Corpus, that they

might be bailed. The same was the law in most, if not all, the Colonies. The first member of the clause could not have intended to prohibit the denial of the privilege or right in such cases, and therefore did not use the language in a universal sense.

But the graver objection to this interpretation arises from the connection of the first with the second member of the clause. If the first member of the clause be taken thus largely, so must be the second. If imprisonment and suspension and denial of Bail, and of the Writ of Habeas Corpus, are universally and abstractly prohibited by the first, they are universally allowed and authorized by the second, in Rebellion or Invasion, when the public safety requires it. And then, when in cases of Rebellion and Invasion, the public safety may be thought to require it by the department to which the power appertains, the privilege may be suspended or denied for any cause, without any offence or suspected offence on the part of anybody, and for any purpose, or to any end, military, civil, fiscal, or political, which that department may think the public safety requires. No condition of life, no loyalty to the Union, the Constitution, and the Government, is exempt from the operation of the power; no domestic relation, parent and child, guardian and ward, master and apprentice, persons in tutelage, whom the laws of all lands leave in charge of their protectors and guides, at least while they commit no offence; no drafted freeman under or above the age prescribed by law; no freeman claimed to be enlisted in the army through fraud, duress, or intoxication; in fine, *nobody* will retain the privilege, if the public safety shall be thought to require its suspension. I hope I may say, that when I suggested, in a former paper, that the President was intended by the Constitution to exercise the whole power that was given by the clause, I had not a conception that the power was anything like this. I agree that the Executive office is entirely unfit for it; but I am equally clear, that no department of Government is fit for it; that such a power has not a precedent in any history, English or American, to justify it; and that it is as unnecessary, either in Rebellion or Invasion, as it is unexampled. The Constitution cannot have intended to give it to anybody. It is against the spirit of the whole instrument, and of all the foundations on which it is built.

Whether the conditions in the *second* member of the clause be simple or complex; that is to say, whether simple Rebellion or Invasion be sufficient, or there must also be danger to the safety of the public, this interpretation of the *first* member, in a universal and abstract sense, puts the whole subject of suspension into the power of some department of the Government with equal universality. There is not a word expressed in either member of the clause to limit this power. It is not confined to any crime, or suspected crime, that may endanger the safety of the country, or assist the Rebellion or Invasion. It is not limited to persons, or individuals, only, but may be applied to entire States, cities, and districts, or the privilege may be altogether abolished during Rebellion or Invasion, if the public safety is thought to require it. It is the omnipotent power of the English Parliament in its highest constitutional functions, and, if liberty is not a mere name in England, higher than that. It may be truly called an exception, which, in time of Rebellion or Invasion, swallows up the whole general rule of personal liberty. Such a conclusion from such premises is more than logically absurd; it is *constitutionally* so. Its ineffable danger is this, that it tends to make the suspension of the privilege, not a preventive or defensive power, but a great *working* power of the laws and operations of the country, in time of Rebellion or Invasion, dependent for its exercise upon the speculations of the law-givers and administrators. It seems impossible to admit that such a power, not contained in that part of the Constitution which assigns to Congress its powers, nor, in the conception of anybody, affirming in the clause itself anything more than an exceptional power of rare application, could have been intended as an instrument of such terrible magnitude, to be used at the discretion of anybody, in a particular condition of the country, neither impossible nor unlikely to occur, but both possible and probable in the course of national life, and which would be competent during that condition to sweep aside the general rule of liberty, which, by its first words, the Constitution declared its purpose to secure to ourselves and our posterity.

I am compelled to reject this construction of the *first* member of the clause, from both its repugnancy to the known law of Habeas Corpus, and the enormous consequences which follow it.

2. The *second* presentable interpretation of the first member of the clause is, that it was meant to prohibit suspension, not universally, but *generally*, with certain necessary exceptions practised in the Colonies before, as in the States since the Revolution, such as I have already alluded to, and perhaps others.

But such an exception out of a prohibition that positively includes all that it refers to, is illogical, and begs the interpretation that it makes. There is no exception in the *first* member of the clause. The thing referred to by the first member, is prohibited in its totality, in all its characteristics together. There is no exception of any one of them. The exception is only in the *second* member, which adopts generally the characteristics which the first comprehends, adding conditions which exclude a part of them. It is, moreover, inadmissible to make, or allow exceptions out of a constitutional provision which contains none, or to make or allow more than it does contain. A special sense may be attributed to the whole, or to parts; but such a meaning cannot be given to the first member of the clause, if it is interpreted in a general sense.

I therefore conclude that it cannot have been the intention of the Constitution to prohibit, either abstractly or generally, by the *first* member of the clause, the suspension or denial of the Writ of Habeas Corpus, and bail or discharge; but that the true meaning of that member of the clause was neither universal nor general, but special or specific; and in this special meaning, the whole clause remedies the evil it intended to prohibit, and effectuates the good end it intended to secure.

3. The third presentable interpretation of the *first* member of the clause remains.

A specific practice or power in suspension of the privilege of the Writ of Habeas Corpus, that is to say, of bail or trial, was within the view of the clause as practised or permissible in England, when there was neither Rebellion nor Invasion; and this the first member of the clause prohibits. It is this meaning of the *first* member of the clause, to which the *second* member is so perfectly adapted as in part to explain the *first*, and qualify it by adding the conditions of Rebellion or Invasion when the public safety may require it.

I have already described in part, what the practice in England was in its origin. But I must pursue the matter further.

I have shown that arrest and imprisonment and denial of Bail and an indefinite postponement of trial, which, in aftertimes, with a definite denial of bail and trial, obtained the name of "suspension of the Habeas Corpus Act," was effected by an Executive Warrant of arrest and commitment from the Privy Council, or from one or two of its members, for treason in *generality*. Since the Habeas Corpus Act, it is well known that the same end is compassed by like warrants from the same Council or Secretaries of State, for precisely the same kind of offence, that is to say, "High Treason, suspicion of High Treason, or treasonable practices," and by an Act of Parliament, to remove the special impediment interposed by the Habeas Corpus Act, which orders Bail to be allowed, and trial, upon all commitments for general treason. The suspension of the right to the benefit of the Writ of Habeas Corpus, in like circumstances, has been exercised in all conditions of the Kingdom, whether in Rebellion, Invasion, War, or Peace. It could be, and probably was, so used before the Habeas Corpus Act, in harmony with the resolution of the twelve Judges; and it has been so used since that Act, in the time of William III, when there was neither Rebellion nor Invasion, and in the reign of George III, when there was almost universal peace.

There has been, perhaps, something like affectation in calling the practice a violation of *Magna Carta*, though it is a wholesome affectation, for it has served to keep that great Charter in the veneration of freemen, in its most valuable, and now almost its only unrepealed provision. But it was not regarded by the twelve Judges of England, in the reign of Queen Elizabeth, as a violation of *Magna Carta*, for the Executive head of the Government to arrest and imprison, and to hold in imprisonment, with a practically indefinite postponement of trial, persons suspected of treasonable practices against the State, though the crime, or the evidence of it, was so incomplete, that it could be, or was, only described in general and indiscriminating terms. The necessity of the State in times of danger, I am entitled to presume, was thought to be a reasonable exception, not keeping out of view altogether preparation for trial, though that was

practically, a very vague kind of preparation, where the crime was not defined, and definition depended on the pleasure of the Crown. Neither was it so regarded in the early years of Charles I, when the Petition of Right was won from him as a conquest for *Magna Carta*. Nor even in the sixteenth year of his reign, when his regal power was nearly prostrate before the paramount right of the people under the Great Charter, and the King and part of his subjects were about to submit everything to the arbitration of the sword; nor until the thirty-first year of Charles II, when not so much the character of that Prince as of his presumptive heir, whom it was found impossible to exclude from the succession, induced an ambitious and very able leader, in opposition to the heir, to put an end to this effect of a commitment for general treason, by a parenthesis in the Habeas Corpus Act; the abrogation or suspension of which Act, in any particular, would afterwards depend upon the pleasure of Parliament, and not of the Crown only.

When our Constitution was in the course of formation, that practice had existed in England for more than two centuries. Some provision for the great danger of the State, in a great crisis, was thought by most men to be necessary in restraint of personal liberty acting to the ruin or to the great danger of the State. But the practice in England was not confined to any overt or notorious crisis, but was open to administration at any time, if Parliament would remove the impediment of the Habeas Corpus Act. This unconditioned power, I apprehend, it was the intention of our Constitution to prohibit absolutely, and to authorize the like power by the like means, and to the like end, under certain conditions; and this I suppose to be the true and necessary effect of the Habeas Corpus clause in our Constitution.

The progress and range of this power in England lead me to advert to a great transaction, involving personal liberty and royal prerogative in the early years of Charles I.

I have already placed before the reader an exact copy of the Resolutions or Articles, signed by all the Judges of England, in 34 *Eliz.*, 1592, in direct response to the inquiry of the highest Crown Officers of Queen Elizabeth. This authority or precedent came before the Court of King's Bench in a very remarkable form, in the great Habeas Corpus cause, in the

third year of Charles I; and again before the Commons of England in the third Parliament of his reign, and, in the course of the same proceeding, before the House of Lords, in conference with the House of Commons, by a Committee of the Commons.

The King, in the interval between his second and third Parliaments, had, by order of Council, instituted a GENERAL DONATION by his subjects, requiring, as a loan or benevolence, the exact sum from every subject which would have been levied if an Act of Parliament had granted to the King four subsidies. The pretext of the Order in Council was the absence of Parliament, and the want of an immediate supply for the necessities of the Kingdom. Some gave, and many refused to give. Some distinguished and able men were conspicuous in counselling others not to give. Those who not only refused, but had counselled others to refuse, were arrested by Warrants from the Privy Council, purporting to be issued *per speciale mandatum domini regis*, by his Majesty's special command, *but without assigning any cause whatever, either specially or generally;* and were committed to prison. Some of them compounded with the King, or apologized, and were discharged; but five of these gentlemen, whose names have been handed down in English history, would make no composition, nor ask the King for their deliverance, but sued out Writs of *Habeas Corpus ad subjiciendum*, from the Court of King's Bench, *Hydè*, being Lord Chief Justice, and *Doderidge Jones* and *Whitlock*, Justices on the Bench. The whole argument, much in detail, printed in 1649, may be found in a volume of Old Tracts in the Philadelphia Library, No. 926, 4to.

It is sufficient to state that the commitment and imprisonment were defended by *Heath*, Attorney-General to the Crown, and the right to bail or discharge denied, partly on principle, and partly on precedents produced by him to the Court. The principle asserted by him was, that when the Privy Council omitted to state in their warrant any other cause than the King's special command, it must be presumed that it was *for reasons of State*, the matter being, as yet, secret, or the evidence not yet completely in hand; and that in such cases prisoners must be remanded. Several precedents were produced, which were said to be to this effect; and one of them was the precedent, in

manuscript, of the Resolution in 34 *Eliz.*, which I have on a preceding page transcribed from Anderson's reports. *Heath* reported the resolution of the Judges to be, that "if a man shall be committed by the Queen, by her command, or by the Privy Council, he is not bailable." "If your Lordship ask me what authority I have for this, I can only say, I have it out of the book of the Lord Anderson, *written with his own hand.*"

This precedent was cited, and a copy of it was shown to the Court, near the end of Heath's argument. Lord Chief Justice Hyde, on referring to it in his judgment delivered at the close of the case, said: "We have compared our copies, not taking them one from the other, but bringing them. We have long had them by us together; and they all agree, word for word, with that Mr. Attorney said he had out of Judge Anderson's book, and it is to this purpose, to omit other things,—that if a man be committed by the commandment of the King, he is not to be delivered by a Habeas Corpus in this Court; for we know not the cause of the commitment."

Selden, *Noy*, and other counsel, who argued for the respective prisoners, produced precedents of an opposite kind; and endeavored to get sight of the precedent in 34 *Eliz.*, Serjeant *Noy* expressly asking "that Mr. Attorney may bring the precedent of 34 *Eliz.*, with him;" but it does not appear that they obtained it then.

The precedent had, no doubt, been falsified by somebody in the point for which it was cited. All the prisoners were remanded to custody, by the judgment of the Lord Chief Justice and all the Judges.

When the Parliament, which the King had been constrained to call, met in the following year, the House of Commons was in a flame of resentment against the order in Council, and especially against the decision of the Court of King's Bench. The precedent in 34 *Eliz.*, was produced before Parliament by Mr. Selden, in Lord Chief Justice Anderson's manuscript book, in his own handwriting, and was verified by Sir Edward Coke, as such; and, instead of being to the point for which it had been cited by the Attorney-General *Heath*, that a warrant of imprisonment from the Privy Council, *per speciale mandatum domini regis*, without any other cause assigned, precluded in-

quiry and bail, there was no such point in any part of the case; but the precedent as produced in the House of Commons, and as it is now copied in a history of the debate in the House, in 1 *Rushworth*, 511, was with unimportant literal variations the very same which now appears in Anderson's reports, as I have reprinted it.

In the debate which ensued in the House, the decision of the King's Bench in remanding the five gentlemen, and the argument of Attorney-General *Heath*, were put to open shame by such men as Sir Francis Seymour, Sir Robert Phillips, Mr. Selden, and Sir Edward Coke: 1 *Rushworth*, 499, 500; and the Resolutions of Sir Edward Coke, to which I have referred in Part I of these remarks, were adopted *nemine contradicente*. I repeat them here for greater convenience of reference:

I. That no freeman ought to be detained in prison, or otherwise restrained, by the command of the King, or Privy Council, or any other, unless *some cause* of the commitment, detainer, or restraint be expressed, for which, *by law*, he ought to be committed, detained, or restrained.

II. That the Writ of Habeas Corpus may not be denied, but ought to be granted to every man that is committed or detained in prison, or otherwise restrained, though it be by the command of the King, the Privy Council, or any other, he praying the same.

III. That if a freeman be committed or detained in prison, or otherwise restrained by command of the King, the Privy Council, or any other, *no cause of such commitment*, detainer, or restraint being expressed, for which, *by law*, he ought to be committed, detained, or restrained, and the same be returned upon Habeas Corpus granted for the same party, then he ought to be delivered or bailed: 1 *Rushworth*, 513.

The point to which it is material now to advert in the *first* resolution is, that a Warrant of arrest by command of the King or Privy Council, or any other, is no authority for commitment or detainer, unless some cause be expressed, for which, by *law*, he ought to be committed or detained; and also in the *third*, that if a freeman be committed or detained by the command of the King, the Privy Council, or any other, no cause of such commitment or detainer being expressed, for which, *by law*, he

ought to be committed or detained, he ought to be delivered or bailed. The resolutions do not touch the question, what is, *by law*, a sufficient ground of commitment or detainer. There was not, in all that thorough, though fiery debate, a single word from any debater that questioned the resolution of the Twelve Judges in 34 *Eliz.*

But, further: the three Resolutions adopted by the Commons were sent to the House of Lords, with a request for a conference, and a complaint against the Judges of the King's Bench for their decision in remanding the five gentlemen; and upon this the Lords agreed upon a conference, and summoned the Judges to appear and explain the grounds of their judgment, as the House of Commons had previously done; and in this conference the whole matter was, after the explanations of the Judges, argued before the Lords and the Committee of the House by Sir Edward Coke especially, on the side of the House of Commons, and by Attorney-General Heath on the part of the King.

It was in this argument that the ground of *reason of State* and necessary secrecy was again taken by the King's counsel, who said, "that the King was not bound to express the cause of imprisonment, because there may be in it matter of State, not yet to be revealed for a time, lest the confederates thereupon may make means to escape the hand of Justice." 1 *Rushworth*, 529. And this was the answer given to it by Sir Edward Coke in concluding his elaborate argument for the Managers. The objection, as he stated it in his own words, was this: "May not the Privy Council commit, without cause showed, in no matter of State, where secrecy is required? Would it not be an hindrance to his Majesty's service?" And this was Sir Edward Coke's answer: "It can be no prejudice by reason of the matter of State, for the cause must be of higher or lower nature. If it be for suspicion of treason, or misprision of treason or felony, it may be by *general* words *couched;* or, if it be for any other thing of smaller nature, as contempt or the like, the *particular* cause must be shown, and no *individuum vagum*, or uncertain cause to be admitted." 1 *Rushworth*, 532–537.

That noble third Parliament of Charles I, were unanimous in this matter against their King. They said in debate, as Festus

said of Paul to Agrippa, "It seemeth *unreasonable* to send a prisoner, and not withal to signify the crimes laid against him;" and the original Greek word could just as well, and better in this application, have been translated *unfounded* or *absurd*. Their arguments conclusively proved, that if a man could be imprisoned *without a cause of offence shown*, he was a slave. That was the definition of a slave. If a man did not own himself to a greater degree than that, he could own nothing else. He had no property, no personality. He was a chattel, and no better. They protested against it, and unanimously voted it out of the presence of English liberty. But in all that sharp and long Habeas Corpus battle between power and law, no one on the side of the Commons attempted to retract, gainsay, or qualify Sir Edward Coke's admission, which fully sanctioned, and in form expanded, the resolution of the twelve Judges, that High Treason *in generality*, suspicion of treason, misprision of treason, assigned in a warrant by the Privy Council, or Executive power of the State, as a cause of arrest and imprisonment, was sufficient to suspend the liberty of a suspected or guilty person for the security of the State.

The Petition of Right, which was won as a law in this controversy between King and Parliament, did not in any degree impugn this doctrine. There were several postulates in the Petition besides that of not issuing warrants of commitment without a cause; but commitments for a cause *in generality*, it left as before, to be determined by the law.

The third and fourth articles in the preamble of the Petition recited, that by the Great Charter of the Liberties of England, it is declared and enacted that no freeman may be taken or imprisoned or disseised of his freehold or liberties, &c., but by the lawful judgment of his Peers, or by the law of the land; and that in the twenty-fifth year of Edward III, "it was declared and enacted by authority of Parliament, that no man, of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disinherited, without being brought to answer by due process of law:" and then the article proceeds,—"nevertheless, against the tenor of the said statutes and other the good laws and statutes of your realm to that end provided, divers of your subjects have of late

been imprisoned, *without any cause showed;* and when, for their deliverance, they were brought before your Justices by your Majesty's writs of Habeas Corpus, there to undergo and receive as the Court should order, and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained *by your Majesty's special command*, signified by your Lords of Privy Council; and yet were returned without being charged with anything to which they might make answer according to law."

The 10th article, the enacting part of the Petition of Right, following this recital, then prays the King, among other things, "that no freeman, *in any such manner as is before mentioned*, be imprisoned or detained." This is the simple requisition on the head of warrants of imprisonment; and, as I have said, left what was a lawful cause of imprisonment to be determined by the law; but warrants without cause showed—warrants by his Majesty's special command, as *before mentioned*,—were pulled up by the roots, as being irreconcilable with the principle of personal freedom at any time or in any circumstances. The resolution of the twelve Judges, and the admission of Sir Edward Coke stood after this as before. The law of denial of the privilege of bail, by imprisonment under warrants of the King and Privy Council, showing or certifying *in generality*, the cause of treason, or suspicion or misprision of treason, treason *by general words couched*, was therefore left by the Petition of Right, as those resolutions had placed it as a power of the Executive head and Council of the Realm, to secure the State against treasonable conspiracies and confederacies.

At this epoch there was no Habeas Corpus Act in England. The doctrines of the common law in regard to the writ of Habeas Corpus, and to the power of the King's Courts and Justices in relation to it, appear to have constituted at that time, the law of Habeas Corpus. But in the 16th year of the same King,—Charles I,—such an act was passed, and this act also left the law of imprisonment by warrants of the Privy Council for treason *in generality*, or suspicion of treason or treasonable practices, exactly as the Petition of Right had left it.

The statute of 16 Charles I, c. 10, was passed, both to abolish certain courts, the Court of Star-chamber, &c., and to bring the

warrants of the Privy Council within the reach of the writ of Habeas Corpus, for the benefit of all the subjects who, it seems, were not entitled to it before, in a peremptory manner, but only at the discretion of the court.

The 8th section of that act enacted, that if any person should be committed or restrained of his liberty, or imprisoned by command or warrant of the King, or of the Council Board, or of any of the Lords of the Privy Council, the Court of King's Bench, or Common Pleas, upon motion in open court, should without delay upon any pretence, forthwith grant a writ of Habeas Corpus, and bring before them the prisoners, with the true cause of the prisoners' detention; after which return, the Court "should proceed to examine and determine whether the cause of such commitment appearing upon the said return *be just and legal, or not*, and thereupon do what to justice shall appertain, either by delivering, bailing, or remanding the prisoner."

And thus this statute left the law as to warrants of the Privy Council for treason *in generality*, as the Petition of Right had left it; and so it continued until the 31 Charles II, in 1679, when a clause in the second section of the Habeas Corpus Act, put an end to this effect of Privy Council warrants for treason *in generality*, by a stroke of the pen.

I have thus stated the matter historically, perhaps too minutely, but accurately and truly as I apprehend it to have been, in order to show what I conceive to have been the intended bearing of the Resolutions of Sir Edward Coke, of the Petition of Right, and of the Statute of 16 Charles I, on that doctrine, which did not disappear as a means of imprisonment, and denial of bail under Privy Council warrants, until the Habeas Corpus Act.*

That great and noble Act, however ignoble or ambitious may

* *Mr. Hallam*, though he admits that the Habeas Corpus Act is a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment, says, that it "introduced no new principle, nor conferred any right upon the subject." *Const. History*, vol. 2, p. 353. It seems probable, on the other hand, that the single clause in the second section of the Act, which made a *general* charge of Treason or Felony an *absolute* title to Bail, was a new principle, and did give a right to the subject, independently of the Resolutions in Anderson. It was an effectual restraint, both on the power of the Crown, and on the discretion of the Judges and Courts.

have been the motives of the sagacious leader who penned this parenthesis, divided generally into two classes, all cases of commitments for any criminal or supposed criminal matter, its second section comprehending *all* such cases of commitment, ("unless the commitments aforesaid were for treason or felony *plainly and specially expressed in the warrant of commitment*,") and entitling them to a delivery upon Habeas Corpus, upon giving bail by recognizance to appear and take their trial; and the seventh section, comprehending the commitments for treason or felony *plainly and specially expressed in the warrant of commitment*, directing such proceedings, that, upon the prayer of the prisoner in open Court to be brought to his trial, he should be brought to trial or discharged, at furthest in the course of the second term of the Court after his commitment. The exception in the 21st section of the Act, in regard to petty treason and suspicion of felony, has no bearing upon this matter.

A full political history of this Act, which lingered in Parliament for many years after the first effort to pass it, and which finally passed, as Burnet says, by a trick or joke, on a division of the House of Lords, by counting a fat Lord in its favor as ten, (and a note of Speaker Onslow, in regard to the numbers in the House at the time, seems to confirm him, Burnet's *Own Times*, 8vo., vol. 2, 256–7,) would be a most valuable acquisition, as the history of a conquest for personal liberty, won from an unprincipled family of kings, in a profligate reign, amid very general corruption, by mixed motives and efforts of good and evil, personal ambition, personal rivalry, personal resentment, and personal fear, with, it is to be hoped, some portion of moral and political virtue, in which the age did not abound. We have a much fuller account of the passing of *Magna Carta*, in the time of King *John*. Whether Charles II and his friends did not observe the exceptive *unless*, in the second section of the Act, or were unable to estimate its effect, or whether the King's fears for the exclusion of his brother, the Duke of York, which the House of Commons had voted, but the Lords did not agree to, made him knowingly yield, lest worst might happen, I have been unable to learn. It is certain, that on the day on which that act received the royal sanction, a killing frost fell upon this flower of the Crown and Privy Council; and, in addition

to the multiplied securities which the Act gave to the subjects of England for their personal liberty, through the Writ of Habeas Corpus, the power of denying or deferring the privilege of bail or trial upon warrants for treason *in generality*, suspicion of treason or treasonable practices, passed over to the Parliament of England. That body only, from that time to this, has been able to supersede, or to stay, the full operation of the Habeas Corpus Act, in any particular, for months, or years, or a day. But, as I have already remarked, although the effect of denying bail under these warrants of the Privy Council passed away, their legality was not destroyed, but continued under the sanction of Parliament, as means to the same end. This point, however, was not left open to question in England for any length of time.

In the year 1697, in the seventh year of William III, the year before the Act of 7 and 8 William III, which suspended the Habeas Corpus Act on Barclay's conspiracy, the authority of a principal Secretary of State to issue such a warrant for treason *in generality*, was brought before the Court of King's Bench, in the time of Sir John Holt; and is reported under the title of "*Proceedings between The King and Thomas Kendall*, and *Richard Roe*," in 4 Hargrave's State Trials, 554.

It was the case of a Habeas Corpus to bring up from Newgate the bodies of the two prisoners; to which the Keeper returned for cause of their detainer, a warrant under the hand and seal of Sir William Turnbull, one of his Majesty's Privy Council, and principal Secretary of State, in his Majesty's name authorizing and requiring the Keeper to receive into his custody, and to keep until they should be delivered by due course of law, the bodies of the two prisoners, "they being charged with High Treason, in being privy to and assisting the escape of Sir James Montgomery out of the custody of William Sutton, one of his Majesty's messengers in ordinary, and charged with High Treason."

In a very able argument by Sir Bartholomew Shower for the prisoners, he contended that they were entitled to be *discharged*, because a Secretary of State and member of the Privy Council had no authority to issue such a warrant: and under this head he denied the Resolutions of the twelve Judges, in 34 Eliz., as

being extrajudicial and without authority. The Secretary, he said, as a Privy Councillor, was not a Justice of the Peace, nor authorized by law to issue a warrant of imprisonment, whatever the Privy Council might do. He also argued, that the prisoners were entitled *to give bail* under the Habeas Corpus Act, because the charge of Treason was *general*, as it did not describe specially what the Treason of Sir James Montgomery was; and the escape could only be of the same species of crime as his. *The Attorney and Solicitor-General* argued for the Crown.

Lord Holt, in giving judgment, said, "I did always give credit to the resolutions of the Judges in *Anderson*." He thought at the same time that the treason was *general*, as Sir James Montgomery's treason was so described, and the crime of the prisoners could not be different. *Rokeby, J.*, said that *Walsingham* had committed two hundred years ago, (?) and that there was another precedent, *Hellyard's* case, 2 Leon, 175.* A *conservator pacis* at the common law could commit; and it is incident to his power of committing, that he may give an oath, and take a recognizance. The Secretaries of State are great officers. They are sentinels to watch for the King, and the common peace of the Realm. But he thought the prisoners ought to be bailed, because it was not expressed in the warrant what was the species of Sir James Montgomery's treason. *Eyre, J.*, thought upon the whole, the prisoners ought to be bailed; and they were bailed. The same question of the Secretary's power to issue a warrant and commit, presented itself in *Money* v. *Leech*, the case of general warrants; but after the Attorney-General *De Grey* argued in support of it, Mr. Dunning conceded the point. 3 *Burr.* 1753, 1763.

We can now understand the course, which with perfect uniformity has been followed in England, in regard to suspension of the privilege, since the Habeas Corpus Act of Charles II. From the time of the conspiracy by Barclay to assassinate William III, up to the last suspension, in a season of profound peace,

* Hellyard's case was a return to a Habeas Corpus from the Common Pleas, 29 Eliz., by the Warden of the Fleet, that he held the prisoner in obedience to a warrant by Sir Francis Walsingham, one of her Majesty's principal Secretaries of State; but because the return did not state the *cause* of the commitment, the Court gave the Warden day to amend his return, otherwise the prisoner should be delivered.

in 57 George III, the same character of warrant for treason *in generality*, suspicion of treason and treasonable practices, emanating from at least six of the Privy Council under hands and seals, or from one of the principal Secretaries of State under hand and seal, has been used to arrest the guilty or suspected parties by name, and to imprison them; and this has been either preceded or followed by an act of Parliament sanctioning the arrest and imprisonment of those prisoners, and of such as in the same manner and form should thereafter be arrested, so far as to deprive them of bail or trial for a prescribed time, without the consent of the Government. I say *preceded* or *followed*, for I have not been able to inspect all the statutes, in consequence of the omission to print such expired statutes in the "Statutes at Large." In the time of William III, the first Act of the kind, 7 and 8 William III, followed the arrest; for the detection and defeat of the conspiracy depended upon the King's prompt and secret action in the first instance. On the last occasion, 57 George III, it certainly followed; for the prisoners were in gaol, and the purpose of the Government was to try them upon what the Crown officers thought was sufficient evidence to convict them of special high treason; but, upon the failure of the first trial, any further trial was thought to be desperate in the prevailing temper of the people, from among whom the jurors were to be selected; and the act of Parliament for staying the privilege of bail and trial was then immediately passed. In the year 1715, the time of the first rebellion for the Pretender, on the accession of George I, I incline to think, from a letter by Lord Chancellor Cowper to the King, in the appendix to Lady Cowper's diary, that the act preceded the arrests, as there had been ample notice of the Pretender's design; but I am not certain. Nor does it matter: for ever since the full incorporation of the great principle of the modern English Constitution, that the King rules through a ministry which has the confidence of Parliament, the King, through the ministry, proceeds in this matter as the public safety appears to demand, and is beforehand sure of the confirmation by Parliament to supersede the Habeas Corpus Act. Practically, therefore, the Executive power of England at this day arrests for treason *in generality*, suspicion of treason, or treasonable practices, when the ministry advise it, and the act of Parliament follows as an

expression of the confidence which subsists between Parliament and the Ministry. Of course this is no arbitrary power of the Ministry, or of the King through the ministry, but it is a practical acknowledgment of the source from which the precautionary arrests should proceed, and is an effect of the consultative intercourse between the King's Ministers and a majority of the two Houses, by whom alone, with the King's assent, the operation of the Habeas Corpus Act can be suspended. And so stood the practice of suspension in England when our Constitution was formed.

After all that *Blackstone* has said in regard to the transcendent power of Parliament in this behalf, it is not easy at first sight to perceive, if the Resolution of the twelve Judges in 34 *Eliz.*, Sir Edward Coke, and Sir John Holt and the Court of King's Bench, in 7 William III, were right, how the intervention of Parliament in this matter is much, if any more, than the exercise of an ordinary Parliamentary power to restrain the operation of the Habeas Corpus Act, which Parliament may repeal altogether; or how, if that Act had not been passed, there could have been any failure of legal capacity in the Privy Council and Secretaries of State, to do without confirmation by Parliament, what they now do when Parliament, before or after the arrest, uplifts the opposing provisions of the Habeas Corpus Act. The only difference between the constitutional and the legislative effect of these Acts, is the difference between imprisonment under a general charge of Treason, which led to denial of bail and an indefinite delay of trial, and imprisonment under a like charge without trial for a specific time, renewable at pleasure by Parliament. This, however, may in principle be a great difference. I honor and revere the fundamental principle of exemption from arbitrary imprisonment; imprisonment without trial. It is a corner-stone of the English Constitution, and of our own; and I have no doubt that the Acts of Parliament which stay the operation of the Habeas Corpus Act, and confine prisoners in gaol on suspicion of Treason, with a denial of bail or trial, are the exercise of a constitutional power, and not of one that is purely legislative; as they surmount the provisions of Magna Carta and 25 Edward III, which Englishmen, as well as ourselves, hold to be a part of the Constitution.

But as our own Constitution authorizes the suspension, with all its incidents, under certain conditions, when the public safety requires it, I cannot see by what analogy to English statutes, an Act of Congress can be required to authorize suspension by the Executive Department. The Convention which reported our Constitution undoubtedly considered it as a power which nothing but the Constitution by the people could give, and therefore framed the clause in such language as made it independent of a Habeas Corpus Act, whether Congress should afterwards pass one or not; and by that clause it became, to my judgment, an Executive power, and not a legislative one.

Whether the power given by the Constitution can be exercised independently of an Act of Congress to authorize it, is, however, no part of the question of construction of the power itself, which I have been considering. It is certainly a *minor* question, when compared with the import of the power itself: for if I have been at all successful in this sketch of what the substantial character of the suspension of the Writ of Habeas Corpus was in England at the time our Constitution was adopted, and had previously been for two hundred years, and have also shown that there was nothing that constitutional history recalled to anybody when the subject was referred to in the Convention, but the definite proceeding by warrant to arrest suspected persons for general treason against the State, and denying them the privilege of bail or trial, without any condition of rebellion or invasion to qualify the power, then it will be seen that there is a reasonable ground to infer that the true meaning of the Habeas Corpus clause in our Constitution is to prohibit this unconditioned suspension, without regard to any overt and public danger of the country, and to authorize the same thing under certain conditions of this overt nature. At that time it seems certain, that suspension of Habeas Corpus, or suspension of the privilege of the Writ, did not recall to any one any other legal power, proceeding, or effect, than that of arresting persons suspected of treasonable designs, committing them to prison, and uplifting, beyond their reach, the writ of Habeas Corpus, as a means of relief; and if this be so, the reasonable interpretation of the Constitution is, that this was intended by the clause, and the power under our Constitution becomes thus as definite and spe-

cific, though under conditions, as the practice in England had been without such conditions; and, under the like judicial cognizance, to see that in form and substance the suspension is what the Constitution authorizes, though without the least authority to examine or to inquire into the evidence or reasons of state, upon which such warrants, arrests, and imprisonments are founded. If the Constitution had authorized, for certain purposes, a *Writ of Right* or a *Writ of Cessavit*, two obsolete writs in English law, we should have had no better guide in English law books for the form and effect of those writs, than we have in English statutes and treatises on legal and political history and learning, for the meaning, process, and effect of suspension of the privilege of the Writ of Habeas Corpus. There is no special legislation in regard to it in England; none is necessary on the part of Congress. Nothing that is even descriptive of its process, cause, or effect, is contained or set forth in the Act that Congress did pass on the 3d March, 1863. That Act leaves everything to implication from the Habeas Corpus clause, except one thing which it interprets, I think, erroneously. The difficulty is to see how the clause admits of legislation, as the whole power is a necessary implication from the clause; or we must reject implication altogether, and turn the power over in the wildest indefiniteness, to be made by legislation whatever Congress shall think fit. If, on the contrary, it is left to necessary implication, the whole proceeding, and the effect of it, become definite, and the power of the President, as the Executive power, or even one of his characteristics as conservator of the peace of the United States, is amply adequate to exercise it, in harmony with the law, and without the aid of any Act of Congress whatever.

I shall add only a few words in regard to the power of the President, to close my remarks on that head.

As it is not difficult to raise a political argument from the structure of our Government, to require the *fiat*, or initial step, to come from Congress, it is not my intention to canvass the question of constitutional expediency, further than it has been included in the nature and design of the power; or to do more than add a summary of the heads of remark, by which I have intended to explain my preference of the President's power. 1. The

authority of the Constitution is complete in itself, if we interpret the word "suspended" as an executive act, which it truly is, instead of an authority to a legislative body to authorize the act. 2. That any supposed analogy of the Acts of Parliament in England, to sanction the denial of bail and trial, is illusory, because those Acts are passed to arrest the operation of the Habeas Corpus Act, which requires that prisoners under a *general* charge of treason, or treasonable practices, shall, if they ask it, be discharged upon giving bail to appear and take their trial. There was no such Habeas Corpus Act here, and there can be none to defeat the power given by the Constitution. Even if the Acts of Parliament were necessary in England, on the principles of constitutional law, to defer or deny *trial* for a definite period, an Act of Congress is unnecessary to initiate a proceeding to this effect, because the power in the Constitution to *suspend* the privilege, implies and carries the whole power. 3. That by requiring a *fiat* by Act of Congress, it is required from the department which is the least able to judge of its necessity, perhaps absent at the time of greatest need, and without the aid of a constitutional ministry in the cabinet of the President, which, having its confidence, might anticipate the authority, and rely upon the sanction of Congress, if, with their advice, the President should take the responsibility of action upon himself. 4. That by requiring the *fiat* of Congress, the people lose the responsibility of the President, for his own independent action under the Constitution, and obtain no responsibility in Congress to supply its place. 5. That the words of the clause, the import of the clause, and its history in the Convention, all tend to the same conclusion, that the power, being executive in its nature, the exercise of it was to be executive, and was manifested in point of intention to be such, by rejecting a reference to the Legislature, in the *exemplar* of the State of Massachusetts, which had been proposed for adoption. The existence of jealousies then known to exist in regard to a single executive, clothed with any effective power, was sufficient reason for avoiding an express reference to his office, when it was implied in so many ways.

I thus conclude my remarks upon the extent and range of the power conferred by the Habeas Corpus clause in the Constitu-

tion. In the description of the power which I have given, it is a known power, and, in one respect, a circumscribed power, known and circumscribed by long-continued, definite, and consistent usage, and, under judicial supervision, to keep it within its limits. Beyond this, it has no limits or circumscription, and may be anything which the speculations or imaginations of men may suggest.

The result of the whole is, that the Constitution, by suspension of the privilege of the Writ of Habeas Corpus, carries by implication, the whole that was understood by that expression,—not the King and Privy Council, nor the Act of Parliament, nor the agency, official or Parliamentary, of another nation, but the fundamental elements of the thing,—the offence, treasonable design against the nation, the warrant of arrest and imprisonment for that cause, and the uplifting of the Writ from the offender during the danger. Who or what body is to initiate or execute the power, the Constitution does not say expressly; and what it implies in this behalf may be settled by the nature of the power, and by the tenor of the Constitution, without affecting the power itself.

If, on the contrary, it is held that the clause gives power to Congress to legislate, as to the cause, instrument, and effect, then it will follow, that while our seemingly more cautious forefathers did limit this power to times of Rebellion or Invasion, in restraint and mitigation of the English practice, yet when Rebellion or Invasion comes, they have enlarged it to comprehend the imprisonment of anybody, in any case, or for any cause, military, naval, fiscal, or political, that a representative body *may think* the public safety requires. This thought or opinion is the only security against excess, and it is neither resistible nor examinable by any one else, nor does it turn upon the bearing of facts in regard to the criminality or criminal designs of suspected persons, but may turn altogether upon general speculations concerning the public danger or safety at large; and if Congress, or anybody else, is to be the regulator, without any restraint at all, it is so transcendent a power, and so overleaping all the barriers which protect the personal liberty of a citizen, that I cannot personally realize it, though I am wide awake to the apprehension; neither can I believe that our

forefathers were wide awake, if they agreed to authorize it without some limitation, even in the most desperate of rebellions like the present.

I have a strong and deep sympathy with every lawful act of the President and Congress to suppress and cast down forever the present rebellion, the greatest crime, I think, that is recorded by History. I have nothing to say about latent beginnings or excuses on either side. It is not my purpose in this paper to judge them. But in its treacherous and sacrilegious outbreak, and in its arrogant and malignant design, no truly impartial man can doubt, and History, unless it be the lie, which Sir Robert Walpole, in spleen or self-defence, said it is, History will not deny that it was the flagrant crime of leaders in the South, and politically of the whole South. If the North and West had not risen as one man against this fraudulent and murderous outbreak, equally against Heaven and against the Union, risen for the sake of the Union and the Constitution, for honor's sake, and for virtue's sake also, no man, however elevated in these sections of the Union, could thereafter have left the world without despair for the honor of his country's name, and that of his posterity. It seemed to me, and still seems, that not to have resisted it, and to resist it to the end, would have been, and must be, to bring the Northern and Western people in our land into everlasting dishonor and shame.

No matter what England or France may say or do. Every nation must be the keeper and defender of her own honor and virtue; and, if we have honor and virtue, we can, with God's unfailing blessing upon them, keep both against all the world; for virtue, national or personal, is, under His blessing, as invulnerable as the diamond in its mine, and will give out an unquenchable light, even in the darkness of poverty and rags. If a man has the proper virtue, his honor is safer than a walled city or fortress. It cannot possibly be taken after he has lost his life in defending it. And so it is of a nation. If the people will keep firm hold of virtue and honor, *Zerah*, the Ethiopian, may come out against them "with an host of a thousand thousand;" and they will remember the faith and the prayer of *Asa:*

"It is nothing with THEE to help, whether with many, or with them that have no power!" Let us forego our adventitious luxuries, even our accustomed comforts, in defence and preservation of this gem of gems, our virtuous honor, and our posterity will be saved for the renewal of a national youth, with both virtue and honor untarnished. In my judgment we have had, and we now have, no alternative, any more than a brave or a good man has an alternative in private life, to choose infamy instead of an honorable death.

I have therefore never been, though I do not assume the name of any living party but that of the country, a disapproving, still less a discoloring critic, of what Congress or the President may have done. On the contrary, if it has happened that I have been unable to concur, I have been generally inclined to follow the advice of Dante's Master, though not at all for his reasons:

"Non ragioniam di lor; ma guarda e passa."

I honor the President's frankness and plainness of speech, as badges of veracity and sincerity,—his sagacity, also, the proof of a self-sustaining spirit, and of strong natural powers of observation. I honor, especially, his benignity of temper, which bespeaks a heart at peace with all the world, his superiority to the common and misleading vanity of thinking himself any greater by his office than he is for it, his exemption from the stain or imputation of misusing his office to promote unworthy personal interests or aims, and his courage, constancy, and untiring zeal, in ten thousand novelties and embarrassments, to do what he thinks his duty, for the restoration of Union and lasting peace. Both Congress and the President, I am convinced, have meant to do the best for the imperilled cause; and, in regard to one great measure of the President, I have never doubted, that it was desirable for the whole nation to arrive at the point to which the measure tended—the freedom of every slave in the country—whatever may have been the doubts about the right of way over the field which it crossed to arrive at it.

I must say, at the same time, that I have never been able to follow the Act of Congress of 3d March, 1863, in relation to Habeas Corpus, nor the Executive acts which have been in har-

mony with its principle, before and since its enactment; and this inability is wholly irrespective of the question, whether Congress or the Executive is the proper department to initiate the suspension of the privilege of the Writ.

This Act of Congress declares or enacts that the President is authorized, whenever in his judgment the public safety may require, to suspend the privilege of the Writ "*in any case,*" without any qualification of cause or offence, throughout the United States, or any part thereof; and the Executive proclamations of 24th September, 1862, and 15th September, 1863, do, in some instances, suspend it, in cases which want the qualification of offence or illegality, unless it is to be taken as an inference from military arrest, confinement, or sentence; and the Act of Congress suspends all judicial proceedings on writs of Habeas Corpus, after a certificate on oath by the keeper of the prisoner, that he is detained by the authority of the President, without any return of the body of the prisoner, as the writ commands, or of the cause of imprisonment.

I cannot, at present, follow these acts, legislative and executive, as true constructions of the Constitution. But I mean to abstain from special criticism of them, as they may be regarded as still *sub judice;* and will confine myself in the remainder of this paper, to some remarks on the bearing of military and martial law upon the suspension of the privilege of the Writ of Habeas Corpus, and upon the judicial power of the United States to visit this species of imprisonment by writs of Habeas Corpus, where it is within its jurisdiction, and to see that it conforms to the Constitution, and to give relief when it does not. Some remarks upon these topics are essential to the due application of what I have already written.

I need hardly remark, that the power of suspending the privilege of the Writ of Habeas Corpus, is a *civil* and not a *military* power. It is, no doubt, in a special sense, supplementary in the time of Rebellion or Invasion, to the military power, the direct object of both being, in such cases, to suppress the rebellion, or to repel the invasion, to which each power is referable. But this does not make the two powers one power, nor blend together their attributes or functions. The suspending power is as much a civil power, and a civil power only, whether exercised by the

President alone, or under the *fiat* of Congress, as the power of a judge or justice of the peace to arrest and imprison a burglar for house-breaking, or a thief for larceny. It is a civil power to arrest and imprison a criminal or suspected criminal, in one case as well as in the other. The difference between them is not in the civil nature of the act or office, but in the design and effect; those of the suspending power being, at least primarily, to prevent the success of the crime by imprisoning suspected persons, and those of the judge or justice being to bring the criminal to trial upon accusation of a crime, and if he is guilty, to punishment. *Blackstone* looks to the Act of Parliament suspending the Habeas Corpus Act, only in the light of a power "to imprison *suspected persons* without giving any reasons for so doing." If we draw our opinions of the power of suspending the privilege of bail from its history and practice in England, including the State of Massachusetts, it is unquestionably a civil power, neither more nor less, and has no more junction, still less identification, with military power, than all other powers of government which are designed to maintain the public authority and rule in the time of Rebellion or Invasion. The two powers, the civil suspensive power, and the military power, do not run into each other's fields, interchangeably; they cannot be combined into one power, which is neither the one nor the other, but something different from both. The suspending power may doubtless assist the purposes of military power, by operating in its own field, and the military power in its own field may assist the design of the suspending power, which is to suppress treason and rebellion; but the military power cannot suspend the privilege, nor can the suspending power perform military duty. Each must do its own work upon its own principles and rules, and nothing can be gained to either of them, or to the country, by an attempted joinder of them. If the military power holds an enlisted or drafted soldier, who denies, or whose parent, guardian or master denies, that he has been lawfully drafted or enrolled, as being under or above age, or as having been forced, drugged, or inveigled into the army, without, or against, his free will, or when he had no competency of will, I do not understand how it can be a constitutional exercise of the power of suspension, to suspend his privilege of the writ of Habeas Corpus, to

leave him with the military power, and prevent his submitting to a competent court the question whether he was lawfully drafted or enlisted. I hold that a military draft, when authorized by act of Congress, is as constitutional and lawful, as a draft upon the Treasury is, when Congress has made an appropriation. But the draft is not the question. Is it a constitutional use of the power of suspension, to deprive a drafted or enlisted soldier, his parent, guardian, or master, of the benefit of the Writ of Habeas Corpus, that he may have a decision, by a competent judicial tribunal, upon the question whether he has been lawfully drafted or enlisted, or not? If it is, the power of suspension annihilates the law of the draft. It may be inconvenient to our Government to lose the soldier, or to lose the time. There may be partisans and judges who countenance and promote opposition to the draft, and to volunteer enlistments, from party hostility; but this is a partial evil, and such as a steady and determined execution of the law of the land will suppress, and finally extinguish. But the total suppression of the fundamental law of the land, and all laws of the land, at its election, even in rebellion and invasion, is probably what the people never thought of, and what the Constitution ought to have spoken more explicitly than it does, to infer such an intention. Whether a man is a lawfully drafted or volunteer soldier, is a question of law upon the facts; a question of the civil law of the land, and not of military law. It is a question which any man may raise for himself, or for his minor son, ward, or apprentice, without treason, and without the least civil or criminal misconduct; and if he cannot raise it, he has lost the principal attribute of a freeman. The history of suspension in England does not present an instance in which the suspension of the privilege has been resorted to, to prevent such a question from being raised, or to silence and overrule it when it was raised. If, in prosecution of a *treasonable design*, gravely suspected by the Executive department, the opposition to the draft is made by soldier, by next friend, or by magistrate, I do not see the necessity of military or martial law in the case. The treasonable design, and its acts in consequence of it, bring the guilty person and persons within the meaning of the Habeas Corpus clause, and the civil power of the Constitution.

I resort to this illustration, to show my meaning, that the power of suspension and the military power, cannot be mixed up, so as to enable the two to do what neither of them can do separately. They may assist each other, each by performing its own work; they cannot, either of them, perform the work of the other, or use any power but their own, and that according to the law of the power. They are distinct and immiscible powers. They may co-operate in their respective spheres; they cannot be conjoined as one, or in one sphere, to do effectively what each is incompetent to do alone.

I have already exhibited the course of argument, historical, legal, and political, from which I think it results, that the Habeas Corpus clause meant to prohibit, by its first clause, the unconditioned power of arresting and imprisoning, without bail or trial, a suspected traitor, when the nation was at peace, or was not in a state of rebellion, or invasive war. This was notoriously the suspension power, as it had been used in England from the time of William III, and was used in no other country under the laws of England, nor had it been used in the Colonies, or in a State, except Massachusetts, in the rebellion of Shays, by the authority of the Legislature, to arrest persons in actual rebellion. The great *exemplar* was, undoubtedly, in England; and the unconditioned power there exercised, was the thing prohibited by the first member of the Habeas Corpus clause, and was by the last member allowed conditionally. It was allowed, however, without reference to any junction or admixture with the military power. Nay, it was absolutely separated from that power, in its universal or general use, and was only allowed for the public safety, when it might be affected, in cases of rebellion, or invasive war; and the public safety, thus intended to be protected, must, by reasonable construction, be understood to mean the public safety, as affected by unlawful acts directly dangerous, and not by such as are innocent and lawful in themselves, but only dangerous upon a general or speculative view of everything lawful, or otherwise, which statesmen may possibly take in forecast of the future. A power to the extent last referred to, may be extended to everybody, innocent or guilty, and to every act, lawful or indifferent. It seems to be entirely beyond, and in opposition to, the scope,

tenor, and spirit of the Constitution; and no language ought to be held sufficient to carry such a power, but such only as admits of no other than the one imperious meaning.

The same that I have said of military law, must be said of what is called martial law, and with at least equal distinctness. I need not define or describe martial law, or the limits of its operation. Whether it is military law raised to a higher power, or the same power in a larger field, it has strength if it is a lawful power, to do without help what it may lawfully do; and it can obtain no strength from the suspensive power to do what is unlawful. If it is lawful by the law of the land, to which the law of arms in all its conditions is subordinate in a general and constitutional sense, it has lawful power to perform its own lawful behests, and wants no assistance from the power of suspension. If it assumes unlawfully the custody of a freeman, and the case of the prisoner is not within the range of the power of suspension, so that the latter may act independently by its own power, the coalition of the two powers can be of no avail to silence the law, or the Writ of Habeas Corpus. They cannot be joined to do that lawfully, which neither of them separately is lawfully competent to do. They are specifically different powers, and act by different means, and *diverso intuitu*. The one is the law of force, applied by military arms, to the overthrow or punishment of resistance to its lawful commands. The other is the civil law of arrest and imprisonment, applied by civil warrant to prevent the perpetration of an offence injurious to the majesty and safety of the nation.

What is true in this relation of military and martial law, is universally true of military courts, or courts martial, in the same relation.

It deserves particular notice, that the suspension of the privilege of the Writ of Habeas Corpus does not imply a law without an act, or an act without a law, but an act under a law of the very highest command. There is no record or account, perhaps there has never been an imagination, of such a thing as a law suspending the privilege of the Writ of Habeas Corpus by positive enactment, generally over a country, or specially over a district, division or municipality of a country, taking away for the time, the benefit of this Writ, from all the inhabitants of

that country or district, and leaving them without this remedy against wrongful imprisonment by anybody. There was something like this in a suggestion by one of the delegates in the Convention; but it was accompanied by no explanation, and must have been uttered in want of familiarity with the history and character of suspension. Suspension of the privilege of the Writ does not repeal the Writ totally or partially. It uplifts for a time the right of certain persons, dangerous to the State, to claim the lawful benefits of the Writ. So it has been always considered from the time it first acquired its name, and from the earliest day when a resolution of the twelve Judges of England allowed the thing without giving it a name. As we used the word in the Constitution, we must be understood to have used it in the sense in which it had generally been used, especially as the Constitution explained it in no other sense. The object is personal, the proceeding is personal, the privilege is personal, the offence, the arrest, and the imprisonment, are personal, and the suspension of the prisoner's privilege of the Writ of Habeas Corpus is personal. There is nothing general or impersonal in any part of the proceeding that follows the high authority from which it proceeds. The personality of the whole thing, from beginning to end, is inseparable from it throughout. The word *suspended* has not, of course, its literal meaning and application in the Habeas Corpus clause. No one can think of a personal privilege or of a Writ being suspended as it were upon a hook or a beam. The word is used metaphorically; but its metaphorical sense and application had been made as definite by use, before we introduced it, as it could be by practical and legal use for more than a century. A geometrical definition could hardly be more precise. It means the uplifting from one who is imprisoned by process under the power, of the privilege of claiming a discharge by bail or trial through the Writ of Habeas Corpus; and the process under the power has always been, and, therefore, must be understood to be, a proceeding by warrant, charging a person with the offence or suspected offence, which the power was created to defeat.

When, therefore, we hear of suspending the privilege of the Writ of Habeas Corpus in a State, or district, we seem to be carried away from the language of suspension into the language

of martial law, or into the language which has been used in regard to martial law, but has never been used or known in regard to this specific civil power of suspending the privilege of the Writ. Nor can it be used with a corresponding effect in the suspension itself, without destroying the order and peace of society, and confounding all the domestic and social relations in the district, which depend for their assurance of safety upon their access to the enjoyment of the Writ of Habeas Corpus.

In describing that which I suppose to have been the formal proceeding in suspension in England, I shall describe what I regard as in substance implied by our own Habeas Corpus clause, and implied, *a fortiori*, from the greater jealousy the amendments to our Constitution declare, of all deviations from formality in proceedings against personal liberty.

1. An oath or affirmation, to sustain the verity of the charge, or the sincerity of the suspicion upon which the warrant is to issue.

But I cannot say this without a qualification. The general principle of the law of both countries is, that a freeman shall not be imprisoned upon a charge of crime, without the oath of a witness to support the accusation. The law requires so much to outweigh the standing presumption of innocence; and there seems to be no more reason for dispensing with it under the power of suspension, where allegiance is assumed to have been broken, than in any other case. Nevertheless, the case of imprisonment under the suspension power, is not within the common rule of criminal proceedings in all points, nor within the direct operation of the amendments to the Constitution, which were meant to sustain that rule. It is, on the contrary, an extreme and abnormal case. In Sir Bartholomew Shower's argument, in the case of *Kendall* and *Roe*, already referred to, there is special reference made to such Privy Council proceedings as originate imprisonment of the person. He admitted that upon suspicion there might be an apprehension; but insisted that there could not be commitment with a charge of an offence, unless there be an indictment, or presentment, or a witness against the offender; and that there can be no witness without an oath. He could find, he said, no law or precedent for the authority of a single Privy Counsellor to give an oath. He

could find no precedent for the Privy Council's committing to custody, but only proceeding by summons and citation. The Court, as I have stated, sustained the resolution of the Judges in 34 *Eliz.*, and the authority of a single Privy Counsellor to commit; but whether there had been an oath in that case was not inquired into, nor did the Warrant allege that there had been one. The Court bailed the prisoners because the charge was treason in general, and was not specially expressed; and did not discharge them, as they would have done, if the Warrant, on any account, had been illegal. Perhaps, in the case of Warrants proceeding from so high a source, and in a matter of State, requiring secret or confidential action, the presumption may be that the oath, or equivalent knowledge, by the party who issues the Warrant, may be presumed. There is, certainly, no difficulty in deposing to the sincerity and verity of a suspicion, as well as to the certainty of a fact; but as the name of the witness cannot be required in a proceeding of this nature, and as a suspicion may be entertained by the judgment of the party himself who issues the Warrant, upon his own observation or knowledge of circumstances, it may be going too far to assert, that an oath, or affirmation, is invariably requisite. It concerns the arresting party's own responsibility more than it does the Court, whose power extends no further than to see that the power of suspension is formally executed. The Acts of Parliament, in England, which suspend the Habeas Corpus Act, do not expressly require an oath, nor any formality of proof, to precede the Warrant; but they expressly require a Warrant, with special authentication, by hand and seal, and a general designation of the *cause*, high treason, suspicion of high treason, or treasonable practices. From anything I have seen, in my researches into such proceedings, I am unable to say that an oath or affirmation, sustaining the verity of the charge, or suspicion, is essential, in all cases, to support a warrant of arrest and commitment under the power; and when the President acts, or is presumed to act, upon his own view or knowledge, I incline to think that it is not.

2. The Warrant I apprehend to be essential or indispensable; and, according to the general rule, it must be printed or written, and signed and sealed by the party authorized to exer-

cise the power, or by the Secretary of one of the Departments, by his authority, and in his name; and this Warrant must show the *cause of arrest*, which cause must be treason generally, or suspicion of treason, or an offence of that character or nature, a high misdemeanor against the safety and majesty of the State; and must authorize the person to whom it is addressed, to arrest the party named in it, as charged or suspected of that offence, and to imprison him, or keep him in custody, until further order, or until he shall be delivered according to law. And either in the Warrant, or by some other document from the same authority, it must be shown that the Warrant is in execution of the power to suspend the privilege of the Writ of Habeas Corpus, and that the privilege of the Writ is suspended. I mean, as I have said, to state the substance, and not the order or language of the form.

I am not to be understood to mean, that the power of executing the Warrant cannot be committed to one who is a military officer, or soldier, or that the custody of the prisoner cannot be assigned to a military officer, or the commander of a military fortress: but the military character of the arresting officer, or of the keeper in custody, or of the place of custody, can have no legal bearing or influence upon the case. It cannot be a military arrest, or a military custody, nor be affected in any way by military or martial law, or by the rules and Articles of War; and for so saying, I think there is the warrant of nearly three hundred years' practice in that country, from whose usages we have adopted the power, qualifying it only by the conditions of Rebellion or Invasion, when the public safety may require its exercise.

These two characteristics, the second alone, perhaps, are the sum and substance of the exercise or execution of the power to suspend the privilege of the Writ of Habeas Corpus, as I apprehend it to be. It was entirely so in England before the Habeas Corpus Act. It has been so since: the effect of the Warrant, in preventing bail or trial, depending on Acts of Parliament, which expressly deny bail and trial, because the Habeas Corpus Act expressly enacts that commitments upon such Warrants for treason generally, and not specially expressed in the Warrant, shall be entitled to bail. If like Acts of Congress

were necessary in the United States, I should not have suggested that the power could be exercised by the Executive Department only; but as the Constitution authorizes *suspension* of the privilege in the cases of Rebellion and Invasion, which includes the whole power, an Act of Congress to that effect is superfluous. Whether an authority from that body must be given to the President to exercise the power, I leave where it has been placed.

Supposing the power of suspending the privilege of the Writ of Habeas Corpus, to be what I have described it as being, and exercisable in the manner described, then it must follow, that the Judicial power cannot be altogether displaced or superseded by it, though it may be so far abridged as only to maintain the rights of persons under a limitation, which confines the Judiciary to the observation of the forms of things rather than of their substance. Nevertheless, those forms are of infinite value, as they exclude dangerous substances, though it may be uncertain what they precisely include; and they decidedly benefit the people at large, though they may not much benefit the prisoner himself. Within the more limited area, I am not able to perceive that the Judicial authorities are not as competent as in other cases, so far as to inquire if the power has been apparently pursued, and to relieve if it has not. On the contrary, I submit with some confidence, that the Judicial Department is competent to inquire into the exercise of the power, and to see that the power has *ostensibly* been exercised within its prescribed limits, if it has any; not indeed to examine into the particular grounds of the suspicion of treasonable design which may be charged, and to judge whether the imputation upon the party imprisoned be well or ill founded in fact or probability; nothing like this; but to know whether the limitations of the power have been ostensibly observed in the execution of the power.

I will endeavor to illustrate my meaning in connection with some of my preceding remarks.

If the power is confined to the case of a warrant to arrest and imprison an individual person, I assert the Judicial power to be competent to inquire whether there is a warrant, and whether an oath is necessary; and if the power is limited to arrest and imprison for some offence within the meaning of the clause com-

mitted or suspected, it is competent to inquire whether the offence is *alleged* in the warrant, or perhaps certified on the return; and, if no cause is alleged or certified, to deal with the case accordingly. I go no further; and I go thus far, as I have said, with some confidence, for this reason, that under the postulates of my argument, if the case is not apparently or formally within and according to the limitations of the power, then its predicament is that of an arrest and imprisonment, without the authority of the Habeas Corpus clause; and being under or by color of the authority of the United States, the Judicial power of the United States extends to it, and ought to be competent to inquire into it, and to give relief by Writ of Habeas Corpus.

I suppose, for instance, that there can be no doubt concerning the following position in regard to the Judicial power in England. In the case of the Resolution by the twelve Judges in 34 *Eliz.*, they say in immediate connection with the Resolution to remand in cases of imprisonment for High Treason in generality, by the Queen's command from her person, or by order from the Council, or one or two of them, "Nevertheless, the Judges may award the Queen's writs to bring the bodies of such persons before them; and if, upon the return thereof, the *causes* of their commitment be certified to the Judges, as it ought to be, then the Judges, in the cases before, ought not to deliver him, but to remand the prisoner to the place from which he came."

Whatever may be thought of the Resolution of the Judges to remand absolutely and finally, as Anderson reports, it will not be doubted that the assertion of the Court's power to award the Writ of Habeas Corpus, and to have a return of the body, and the cause of commitment by the Queen personally, or by the Privy Council, is in harmony with the immemorial power of the Judicial Department, and the principles of the law of Habeas Corpus. If it was not at the time obligatory upon the Court by statute to issue the writ in the case of such Privy Council commitments, it was made so by 16 Charles I, c. 10, and universally in cases of commitment for criminal or supposed criminal offences by the Habeas Corpus Act.

So in the proceedings in the case of *Kendall* and *Roe*, in the King's Bench, after the Habeas Corpus Act, where the commit-

ment under the warrant of a Secretary of State was probably intended to describe the offence in the warrant as a plainly and specially expressed case of High Treason, and the counsel for the Crown argued that it was so, and therefore was not bailable, the Court held that it was not so described, and therefore bailed the prisoners.

In like manner, there can be no doubt, if under any of the various English statutes which are called suspensions of the Habeas Corpus Act, commitments had been made by the Privy Council or principal Secretaries of State, by warrants which omitted to show any cause, or any such cause of imprisonment as these statutes authorize or admit, or without the authentication of the warrant they require, the Court of King's Bench or Common Pleas would give relief and discharge the prisoners absolutely, or upon recognizance of bail if the cause was bailable. The principle is as clear as possible. The statutes in question deny bail and trial only in the cases described in them, and in manner and form, as well as in substance, as they are described; and, if the prisoner is otherwise committed than according to one of these statutes, the Habeas Corpus Act must have its full operation.

The United States have no Habèas Corpus Act; but the Courts of the United States have power to issue Writs of Habeas Corpus, and all other writs which are either specially provided for by statute, or may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law; and the Justices of the Supreme Court, and the Judges of the District Courts, respectively, have power to grant Writs of Habeas Corpus for the purpose of inquiry into the cause of commitment, with a proviso as to their extent, which has no effect to abridge it where the prisoners are in custody under or by color of the authority of the United States.

It is this particular matter, the *cause* of commitment, as assigned in the Warrant, or certified in the return to the Writ, that I conceive the Judicial authorities are both formally authorized, and officially obliged to know. All other omissions may for the present be prætermitted. This is cardinal.

Since the time of Charles I, and the Petition of Right, which has been regarded as in part a basis of our Constitutions, a war-

rant of arrest and imprisonment without assigning a cause of commitment, general or special, has been repudiated as a badge of slavery. It is so in effect; for we can conceive of no personal liberty as remaining with an individual or people, where imprisonment can be enforced without a cause expressed in the Warrant, or certified in the return of it to a Writ of Habeas Corpus. And it is as necessary in the case of suspension of the privilege of the Writ as in any other case; nay, more so, if possible, because it is the only fact which justifies or explains the suspension of the privilege as not being an act of mere will and force. It is thus inseparably connected with Warrants in suspension of the Habeas Corpus Act in England.

It cannot be supposed that the power of suspension, or the act of suspension, is the *cause* of the imprisonment. Suspension is the ouster of relief on account of the cause.

Neither is the Warrant or order to commit the prisoner to custody, the *cause* of the imprisonment. The Warrant is the mandate to imprison on account of the cause.

Neither is the *reason* of the imprisonment the cause of it. I have already stated what Blackstone says of suspension of the Habeas Corpus Act, that it is a power to imprison a suspected person without giving any reason for it; but he did not intend to confound the reason with the cause, for there is not an Act of Parliament to restrain or suspend the Habeas Corpus Act, that does not require the *cause* of High Treason, suspicion of High Treason, or treasonable practice, to appear in every warrant, whether by six of the Privy Council, or by a principal Secretary of State. The *reason* is the motive of State. It is for the State to give or withhold it at pleasure. The Courts are not to judge of it.

The danger to the safety of the public is not the cause. That is the inducement of the arresting power, or the asserted tendency and bearing of the *cause*.

The *cause* of the imprisonment is the offence or violation of duty on the part of the real or suspected offender. Lawful imprisonment without a cause, is a legal impossibility, and a contradiction in terms. If a cause is not assigned or certified in return to the Writ, the imprisonment must appear to the Court or Judges as the simple result of will and force without cause.

Unless it be the true interpretation of the Habeas Corpus clause, to give an unlimited arbitrary power, without respect to case or cause, in time of Rebellion or Invasion, the Warrant must assign a cause, or the return to the Writ must certify it, or it is illegal. This is my present impression.

It may be argued, that the benefit of knowing the cause of imprisonment is a part of the prisoner's privilege of the Writ that is suspended. But this is not so. It has never been so regarded in the practice of suspension, ancient or modern. It is the right of the Court to know the cause. It is the privilege of all the freemen in the country to have it known in every case, that it may be known in their own. It is the privilege of the offender, or suspected offender, *at the time* he is arrested and ordered to be committed. I am not able to imagine a reason why a cause should not be assigned in the Warrant, or certified to the Court, considering the great latitude which the proceeding permits for the use of general terms in the charge of the offence; and nothing, I apprehend, will satisfy the omission, but a construction that the Habeas Corpus clause, in cases of Rebellion or Invasion, authorizes imprisonment for that which is no offence nor suspected offence, if the public safety may require it.

These general remarks upon the distinct fields of operation of the power to suspend the privilege of the Writ, of the military power, and of martial law, and of the Judicial authority to know and maintain the limits of the suspensive power, if there be any, in behalf of personal freedom, are all that I deem it necessary to add to my observations on the nature, extent, and range of the power of suspension.

In this paper I have intended to confine myself to one topic, and to avoid, even in my illustrations of it, a reference to the merits of any other disputable matter of law, which agitates the country. Having, three years since, entered upon the consideration of the President's power to suspend the privilege of the Writ, I have thought it proper, in a moment of greater calm, and of renewed confidence by the people in the political virtue of the President, which gives additional vigor to all his lawful power

under the Constitution and laws, to show that what I then wrote, did not proceed from opinions that were hostile to the personal liberty of freemen, whatever might be their opinions, within any range that does not include treasonable designs against the United States; and that it as little proceeded from a disposition to curtail the Judicial power as the Constitution creates it, and the laws have organized its tribunals. If the laws work freely within the scope of the Constitution, for the defence of our Union and Unity as a Nation, there need be no fear, that either the Union or the Constitution will break down in the hearts of the people, by the weight of any extra authority the Habeas Corpus clause gives to the Government in seasons like the present, which the calm judgment of the supreme adjudicating power shall deliberately sanction as fairly comprehended by the grant.